

# CALIFORNIA LAW REVISION COMMISSION

*Pre-Print* REPORT

## Charter Schools and the Government Claims Act

**Note:** This is a pre-print report. The Law Revision Commission has approved the substance of this report, but minor editorial changes may be made prior to final publication.

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## SUMMARY OF REPORT

Charter schools are publicly funded schools of choice. They are subject to the constitutional requirements of the public school system, but are exempted from many of the statutory requirements that regulate traditional public schools.

Although charter schools are part of the public school system, a charter school may be formed as a nonprofit public benefit corporation, legally separate from its chartering entity. A chartering entity is not liable for the obligations of a charter school that is formed as a nonprofit public benefit corporation.

This quasi-public character of some charter schools has led to questions about whether charter schools are public entities for the purposes of various statutes that govern public entities.

In response, the Commission was authorized to study the legal and policy implications of treating a charter school as a public entity for the purposes of the Government Claims Act (Gov't Code §§ 810-998.3). See 2009 Cal. Stat. res. ch. 98 (ACR 49 (Evans)).

This report sets out the Commission's findings on the matter. It discusses the advantages and disadvantages of a range of possible reform alternatives, but makes no recommendation on which would strike the best policy balance. Each of the alternatives discussed involves competing policy considerations, which would best be weighed by the elected representatives of the public (with the benefit of the Commission's analysis), rather than by the Commission.

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## CHARTER SCHOOLS AND THE GOVERNMENT CLAIMS ACT

### INTRODUCTION

Charter schools are publicly funded schools of choice. They are part of the public school system<sup>1</sup> and are subject to a number of the duties and restrictions that govern public schools.

However, charter schools also enjoy a high degree of operational flexibility and independence. A charter school is exempted from most of the statutory law that governs public schools,<sup>2</sup> and can be formed as a nonprofit public benefit corporation, with a separate legal identity from the public entity that chartered it.<sup>3</sup>

Because a charter school can operate as a “quasi-public entity” (i.e., a private entity that is created, pursuant to statutory authority, to perform a public function<sup>4</sup>), questions have arisen about whether a charter school should be treated as a public entity for various statutory purposes.

In 2006, the California Supreme Court decided *Wells v. One2One Learning Foundation*.<sup>5</sup> In *Wells*, the Court held that charter schools are not public entities for the purposes of the False Claims Act and the Unfair Competition Law.<sup>6</sup> Unlike a public entity, a charter school can be sued under those statutes.

In the same case, the Court declared that charter schools “do not fit comfortably within any of the categories defined, for purposes of the [Government Claims Act<sup>7</sup>] as ‘local public entities.’”<sup>8</sup> Although that statement was not a necessary part of the Court’s holding, it did signal that the Court was inclined against viewing a charter school as a public entity for the purposes of the Government Claims Act.

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1. See Educ. Code § 47615; *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1137, 89 Cal. Rptr. 2d 745 (1999).

2. See Educ. Code § 47610.

3. See Educ. Code § 47604.

4. For a discussion of quasi-public entities in another context, see *Administrative Adjudication by Quasi-Public Entities*, 26 Cal. L. Revision Comm’n Reports 277 (1996).

5. *Wells v. One2One Learning Found.*, 39 Cal. 4th 1164, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006).

6. *Id.*; Bus. & Prof. Code § 17200 *et seq.* (Unfair Competition Law); Gov’t Code § 12650 *et seq.* (False Claims Act).

7. See Gov’t Code § 810 *et seq.* Although these provisions are often referred to as the “Tort Claims Act,” the California Supreme Court now refers to the statute as the “Government Claims Act,” because some of its provisions apply to contract claims and other non-tort claims. See *City of Stockton v. Superior Ct.*, 42 Cal. 4th 730, 741, 171 P.3d 20, 68 Cal. Rptr. 3d 295 (2007). The Commission will follow the Court’s practice.

8. *Wells*, 39 Cal. 4th at 1214.

In 2007, the Second District Court of Appeal decided *Knapp v. Palisades Charter High School*.<sup>9</sup> In that case, the court expressly adopted the reasoning in *Wells* and held that a charter school that is formed as a nonprofit corporation is not a public entity for the purposes of the Government Claims Act.

In 2008, legislation was introduced to overturn the holding in *Knapp*.<sup>10</sup> That legislation was not enacted. Instead, a resolution was enacted in 2009, authorizing the Law Revision Commission to conduct an “[a]nalysis of the legal and policy implications of treating a charter school as a public entity for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.”<sup>11</sup>

This report was prepared pursuant to that authority. It presents the Commission’s findings on the matter. The remainder of the report is organized as follows:

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9. *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708, 53 Cal. Rptr. 3d 182 (2007).

10. AB 1868 (Walters) (as amended Mar. 24, 2008).

11. 2009 Cal. Stat. res. ch. 98 (ACR 49 (Evans)).

## CHARTER SCHOOLS ACT

The Charter Schools Act of 1992<sup>12</sup> authorizes the creation and operation of charter schools in California.

Charter schools are publicly funded schools of choice.<sup>13</sup> In other words, they receive public funding in a manner similar to traditional public schools, but no student is required to attend a charter school.<sup>14</sup> Nor may a student be denied admission to a charter school, if there is sufficient capacity.<sup>15</sup>

In 2009, California had more than 850 charter schools that serve about 2.5% of public school students between kindergarten and twelfth grade.<sup>16</sup>

The stated purpose of charter schools is to:

- Improve student learning.
- Increase learning opportunities for students, particularly those identified as academically low achieving.
- Encourage innovation in teaching methods.
- Create new professional opportunities for teachers.
- Provide families with more choice within the public school system.
- Make charter schools accountable for performance.
- Create new competition with traditional public schools to promote improvements in all public schools.<sup>17</sup>

A charter school is exempt from much of the statutory law governing public schools.<sup>18</sup> However, a charter school must follow some of the same general admissions and program requirements as a traditional public school. For example, a charter school:

- Cannot charge tuition.<sup>19</sup>
- Must have nonsectarian programs, admission policies, and employment practices.<sup>20</sup>
- Must not discriminate.<sup>21</sup>

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12. Educ. Code § 47600 *et seq.*

13. R. Zimmer & R. Buddin, *Making Sense of Charter Schools: Evidence from California* (2006), available at [http://www.rand.org/pubs/occasional\\_papers/2006/RAND\\_OP157.pdf](http://www.rand.org/pubs/occasional_papers/2006/RAND_OP157.pdf).

14. Educ. Code § 47605(f).

15. Educ. Code § 47605(d)(2).

16. Cal. Dep't of Educ., Fact Book 2009: Handbook of Education Information, at 100 (2009), available at <http://www.cde.ca.gov/re/pn/fb/documents/factbook2009.pdf>.

17. Educ. Code § 47601.

18. Educ. Code § 47610.

19. Educ. Code § 47605(d)(1).

20. *Id.*

- 1 • Must provide for special education students in the same manner as traditional
- 2 public schools.<sup>22</sup>
- 3 • Must comply with statewide testing programs.<sup>23</sup>
- 4 • Must have credentialed teachers for “core” courses.<sup>24</sup>

### 5 **Creation and Revocation of Charter**

6 A charter school may be created as a completely new school (“start up”) or be  
7 converted from an existing public school (“conversion”).<sup>25</sup> More than three-  
8 quarters of charter schools are start-ups and the rest are conversions.<sup>26</sup> A private  
9 school *may not* convert to a charter school under the Charter Schools Act.<sup>27</sup>

10 Anyone can propose the creation of a charter school by creating a petition and  
11 gathering the requisite number of signatures.<sup>28</sup> The petition and a copy of the  
12 proposed charter must be submitted to the entity that will authorize the charter  
13 (“chartering entity”).<sup>29</sup> The chartering entity is usually the local school district.  
14 The county board of education and the State Board of Education are also  
15 authorized to issue charters, but do so rarely.<sup>30</sup>

16 A charter must provide specific information about the structure and operation of  
17 the proposed charter school.<sup>31</sup> The petitioner must also provide a proposed budget  
18 for the first year of operation of the charter school that includes start up costs, and  
19 cash flow and financial projections for the first three years.<sup>32</sup>

20 A charter is presumed to be approved if it meets the requirements of the Charter  
21 Schools Act. A charter may be denied only with a written finding of facts that  
22 support the denial.<sup>33</sup>

23 A charter may be revoked if there is substantial evidence that the school  
24 materially violated the charter, did not meet student outcomes, did not follow

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21. *Id.*

22. Educ. Code § 56145.

23. Educ. Code § 47605(c)(1).

24. Educ. Code §§ 47605(l), 47605.6(l).

25. Educ. Code §§ 47605, 47606.

26. Cal. Dep’t of Educ., *supra* note 16, at 100.

27. Educ. Code § 47602(b).

28. Educ. Code §§ 47605, 47606.

29. Educ. Code §§ 47605, 47605.5.

30. Educ. Code § 47605.8.

31. Educ. Code §§ 47605(b)(5)(A)-(P), 47605(g), 47605.6(h).

32. Educ. Code § 47605(g).

33. Educ. Code § 47605(b).



generally accepted accounting principles, engaged in fiscal mismanagement, or violated the law.<sup>34</sup> The Charter Schools Act provides a procedure for revocation.<sup>35</sup>

### **Oversight and Accountability**

The chartering entity is responsible for oversight of the charter school. The charter school must respond to reasonable requests for information from the chartering entity, the county board of education, and the State Superintendent of Public Instruction.<sup>36</sup>

However, the required oversight of charter schools is limited to the following:

- Identify at least one staff member as a contact person for the charter school.
- Visit the charter school at least annually.
- Ensure the charter school complies with all required reports.
- Monitor the fiscal condition of the charter school.
- Notify the State Department of Education if the charter is revoked, the charter renewal is granted or denied, or the charter school will cease operation.<sup>37</sup>

A school district that grants a charter to an incorporated charter school is entitled to have one representative on the board of directors of the nonprofit public benefit corporation.<sup>38</sup>

To finance these oversight activities, the chartering entity may charge the charter school the actual costs of oversight, up to one percent of the charter school's revenue.<sup>39</sup>

A charter school must submit a preliminary budget and specified financial reports each year to its chartering entity and the county superintendent of schools.<sup>40</sup> A charter school must obtain an annual independent fiscal audit that follows generally accepted auditing principles.<sup>41</sup>

### **Governance Structure**

The Charter Schools Act does not require a particular governance structure, and gives a charter school the option to organize as a nonprofit public benefit corporation, with a legal identity separate from the chartering entity.<sup>42</sup>

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34. Educ. Code § 47607(c).

35. Educ. Code § 47607(d)-(k).

36. Educ. Code § 47604.3.

37. Educ. Code § 47604.32.

38. Educ. Code § 47604(b).

39. Educ. Code §§ 47604.32(f), 47604.33(c), 47613.

40. Educ. Code § 47604.33.

41. Educ. Code §§ 47605(b)(5)(I), 47605.6(b)(5)(I).

42. See Educ. Code § 47604.

1 A chartering entity is not liable for any of the debts or obligations of an  
2 incorporated charter school, as long as the chartering entity's oversight role has  
3 been fulfilled.<sup>43</sup>

4 Although a charter school can be formed as a private nonprofit corporation, all  
5 charter schools are considered part of the public school system for purposes of  
6 Article IX of the California Constitution.<sup>44</sup>

7 All charter schools are considered public entities for purposes of a joint powers  
8 agreement and may thus join a risk pool with a traditional school district.<sup>45</sup>

## 9 **Operational Issues**

### 10 ***Personnel***

11 All charter school employees, including those employed by a nonprofit public  
12 benefit corporation, have the right to be represented through a collective  
13 bargaining process.<sup>46</sup> The charter school may declare itself the public school  
14 employer for this purpose. Otherwise, the district is considered the public school  
15 employer.<sup>47</sup>

16 Charter schools may choose to participate in the State Teachers' Retirement  
17 System or the Public Employees' Retirement System, or both.<sup>48</sup>

### 18 ***Financing***

19 For purposes of the state constitution and school financing, a charter school is  
20 considered to be under the exclusive control of the officers of the public schools.<sup>49</sup>  
21 Charter school funding is similar to traditional public school funding. The funding  
22 follows the student, whether the student attends a traditional public school or a  
23 charter school.<sup>50</sup>

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43. Educ. Code § 47604(c).

44. Educ. Code § 47615.

45. Gov't Code § 6528. Before 1998, many charter schools were members of a joint powers agreement ("JPA"). After charter schools were authorized to organize as nonprofit public benefit corporations, an attorney for one of the risk-pooling JPAs determined that an incorporated charter school would not be eligible to participate in the JPA. The purpose of Government Code Section 6528 was to remove confusion and unambiguously allow a charter school to participate in JPAs, notwithstanding its corporate form. See Senate Local Government Committee Analysis of AB 101 (Mar. 30, 2000), p. 2.

46. Educ. Code § 47611.5(a).

47. Educ. Code § 47611.5(b).

48. Educ. Code § 47611.

49. Educ. Code § 47612(a).

50. *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 1202, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006).

1     ***Facilities***

2     One challenge charter schools face is finding suitable facilities. Initially, charter  
3     schools had extremely limited funding for facilities. Recently, the Legislature has  
4     expanded the availability of facilities funding for charter schools.<sup>51</sup>

5     The Charter Schools Act declares that “public school facilities should be shared  
6     fairly among all public school pupils, including those in charter schools.”<sup>52</sup> In  
7     some cases, the local school district must provide facilities to the charter school  
8     that are reasonably equivalent to those a traditional public school student would  
9     occupy.<sup>53</sup>

10    **Health and Safety Issues**

11    ***The Field Act***

12    The Field Act requires a public school building to be designed and constructed  
13    to fulfill special building standards set by the state.<sup>54</sup> The Field Act was intended  
14    to provide for the safety of the occupants of school buildings in an earthquake.<sup>55</sup>

15    An Attorney General opinion concluded that charter schools are not required to  
16    follow the Field Act, unless the school’s charter requires it. The opinion used a  
17    plain language interpretation of the Charter Schools Act to come to its conclusion,  
18    because Section 47610 exempts charter schools from most of the laws applicable  
19    to school districts.<sup>56</sup>

20    In contrast, a private school is subject to the Private Schools Building Safety  
21    Act.<sup>57</sup> That legislation is analogous to the Field Act. It was intended to ensure that  
22    children attending a private school will have similar earthquake safety protections  
23    in their buildings as public school children.<sup>58</sup>

24    Thus, a charter school appears to be in a unique position, with more flexibility as  
25    to facilities than either a traditional public school or a private school.

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51. See, e.g., Educ. Code §§ 17078.52, 17078.66 (Charter School Facility Program).

52. Educ. Code § 47614(a).

53. Educ. Code §§ 47614(b) (requiring school districts to share facilities with charter schools and allowing school district to charge pro rata share of actual costs), 47613(b) (allowing school district to provide rent-free facilities as part of three percent oversight fee).

54. Educ. Code § 17280.

55. 80 Ops. Cal. Atty. Gen. 52 (1997).

56. *Id.*

57. Educ. Code §§ 17320-17336.

58. Educ. Code § 17322.

1     ***General Building Standards***

2     In 2005, the Charter Schools Act was amended to state generally that a charter  
3     school must comply with the California Building Standards Code.<sup>59</sup> This  
4     amendment was a response to arguments on the part of some charter schools that  
5     they were not subject to plan review or inspection by the state architects or local  
6     building departments.<sup>60</sup>

7     ***School Health and Safety Standards***

8     The Education Code contains a number of health and safety provisions. Most of  
9     the provisions apply to public schools, without making any express reference to  
10    charter schools.<sup>61</sup> Some health and safety provisions apply to both public and  
11    private schools without express reference to charter schools.<sup>62</sup> Under the general  
12    provision exempting charter schools from laws governing private schools, it  
13    appears that none of those health and safety requirements apply to a charter  
14    school.

15    A charter school is, however, responsible for establishing procedures to protect  
16    the health and safety of students and teachers as part of the charter.<sup>63</sup> Unlike many  
17    of the health and safety requirements that traditional public schools and private  
18    schools must follow, the charter school safety plan requirements do not have  
19    specific parameters. Thus, a charter school has a great deal of flexibility in  
20    determining what constitutes reasonable health and safety procedures.

21                   GOVERNMENT CLAIMS ACT

22    The traditional fault theory of tort liability requires the party who breached a  
23    duty of care and caused an injury to compensate the injured party. The fault theory  
24    serves three purposes:

- 25       (1)   It shifts losses away from an innocent injured party and to the responsible  
26           party.  
27       (2)   It deters behavior likely to cause injury.  
28       (3)   It encourages the use of precautions to prevent injury.

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59. Educ. Code § 47610(d). But see Educ. Code § 47610.5.

60. Assembly Committee Analysis of SB 1054 (June 27, 2005), pp. 2-3.

61. See, e.g., Educ. Code §§ 32280-32289 (requirement to create comprehensive school safety plans, including disaster procedures).

62. See, e.g., Educ. Code §§ 32001 (duty to provide fire alarms and conduct fire drills), 32020 (gates must be wide enough to allow emergency vehicles to access all portions of the buildings), 32030-32034 (eye protection must be available), 32040-32044 (duty to equip schools with first aid kit), 32060-32066 (art supplies with certain toxic substances are prohibited).

63. Educ. Code § 47605(b)(5)(F).

1 The unique role of government in society makes the application of those  
2 principles problematic.<sup>64</sup>

3 The government makes and enforces the laws. It also engages in many activities  
4 that serve the public at large. These activities are mandatory and reflect policy  
5 decisions made by the people through their legislators. A public entity cannot  
6 simply halt a service that is deemed too costly or risky.

7 A public entity also does not profit from its operations in the same manner as  
8 private entities. It receives its revenue from the taxpayers rather than directly from  
9 the users of its services. Therefore it cannot adjust its pricing to offset the cost of  
10 potential liabilities.

11 As a result, the traditional purposes of tort liability are not necessarily  
12 appropriate in the context of public entity activities.<sup>65</sup>

13 Even when a public entity provides a service that is analogous to a privately  
14 offered service, traditional tort theories can be difficult to apply, because the  
15 government version of the service often contains constraints not applicable to  
16 private entities.<sup>66</sup>

17 Sovereign immunity accommodates the unique nature of government. It protects  
18 the public fisc from depletion and allows government to govern.<sup>67</sup> It also reduces  
19 the possibility of judicial interference in the development of public policy.<sup>68</sup>

20 The Government Claims Act<sup>69</sup> balances the competing policies of governmental  
21 liability and immunity. The Act was the result of a Commission study and

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64. Van Alstyne, *A Study Relating to Sovereign Immunity*, 5 Cal. L. Revision Comm'n Reports 1, 271-72 (1963) (discussing fault theory, which requires party who breached duty of care and caused injury to compensate injured party, and risk or strict liability theory, which spreads cost of loss among all who might benefit regardless of fault).

65. See *Recommendation Relating to Sovereign Immunity, Number 1 — Tort Liability of Public Entities and Public Employees*, 4 Cal. L. Revision Comm'n Reports 801, 810 (1963) (hereinafter, *Number 1 — Tort Liability of Public Entities and Public Employees*).

66. *Id.* A comparison between public and private schools provides an example of how two apparently analogous services can be quite different. Public schools must provide an education to all who qualify and must abide by nondiscrimination rules. Private schools may have selective admissions policies. Public schools may not charge tuition but private schools have no such financial constraint. Cal. Const. art. IX, § 5; see also Educ. Code § 200; *Number 1 — Tort Liability of Public Entities and Public Employees*, *supra* note 65, at 810.

67. See, e.g., *Alden v. Maine*, 527 U.S. 706, 750-51 (1999) (discussing how protecting government fisc keeps resources from being shifted away from important governmental activities and allows government to govern by allowing government to allocate limited resources without diverting too many resources toward defending lawsuits and paying claims).

68. *Id.* at 750 (discussing possibility of government making policy decision about acceptable levels of risk and having court rule on reasonableness of that policy decision if sovereign immunity is not available).

69. Gov't Code §§ 810-998.3.

1 recommendation.<sup>70</sup> It codified a patchwork of local rules, state rules, and case  
2 law.<sup>71</sup>

3 The purpose of the Government Claims Act is to define and limit public  
4 employee and public entity tort liability. It abolished common law tort liability for  
5 public entities, making all public entity liability statutory.<sup>72</sup>

6 Relevant features of the Government Claims Act are summarized below.

### 7 **Scope of Application**

8 The Government Claims Act applies to “public entities”<sup>73</sup> and “public  
9 employees.”<sup>74</sup> Public entities are further subdivided into the “state,” a “local public  
10 entity,” or a “judicial branch entity.”<sup>75</sup>

11 A local public entity includes political subdivisions or public corporations in the  
12 state, such as a county, city, or district, but does not include the state. Local public  
13 entities are independently liable for their torts.<sup>76</sup>

14 A school district is a local public entity.<sup>77</sup> An individual school is considered an  
15 arm of the district and the district is liable for the torts of the school.

### 16 **Claim Presentation**

17 In general, a claimant may not bring a suit for money or damages directly  
18 against a public entity or a public employee acting within the scope of  
19 employment. Instead, a claimant must first present a written claim to the public  
20 entity.<sup>78</sup> There is a single standardized claim presentation procedure that applies to  
21 the state, local public entities, and public employees.<sup>79</sup>

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70. 1963 Cal. Stat. ch. 1681.

71. *Number 1 — Tort Liability of Public Entities and Public Employees*, *supra* note 65, at 807.

72. See Gov’t Code § 815 & Comment; *Hoff v. Vacaville Unified Sch. Dist.*, 19 Cal. 4th 925, 932, 968 P.2d 522, 80 Cal. Rptr. 2d 811 (1998).

73. “‘Public entity’ includes the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state.” Gov’t Code § 811.2. The definition is meant to be applied broadly and includes the state and all of its local and regional subdivisions. See Gov’t Code § 811.2 Comment.

74. “‘Public employee’ means an employee of a public entity.” Gov’t Code § 811.4. Independent contractors are specifically excluded from the definition of a public employee and receive special treatment under the Government Claims Act. Gov’t Code §§ 810.2, 815.4.

75. Gov’t Code §§ 900.3, 900.4, 900.6.

76. Gov’t Code §§ 900.4, 940.4.

77. See, e.g., *Wright v. Compton Unif. School Dist.*, 46 Cal. App. 3d 177, 181-82, 120 Cal. Rptr. 115 (1975).

78. See Gov’t Code §§ 905, 910, 950, 950.2, 950.6(a).

79. *City of Stockton v. Super. Ct.*, 42 Cal. 4th 730, 739, 171 P.3d 20, 68 Cal. Rptr. 3d 295 (2007).

1 The claims presentation procedure is intended to facilitate the early resolution of  
2 claims, allowing meritorious claims to be settled quickly without litigation.<sup>80</sup>

3 Claim presentation requirements serve several policy goals. They protect the  
4 public fisc and allow some injured parties to be compensated quickly.<sup>81</sup> The early  
5 presentation of claims also provides timely notice of a dangerous activity or  
6 condition, allowing a public entity to take corrective steps promptly.<sup>82</sup>

### 7 ***Time Limits***

8 One significant consequence of the claim presentation requirement is that it  
9 effectively shortens the statute of limitations for the underlying cause of action.  
10 The time period available for presenting a claim is six months or one year,  
11 depending on the basis for the claim.<sup>83</sup> By contrast, statutes of limitation for  
12 common causes of action against private entities range from one to four years.<sup>84</sup>

13 A claimant who files an action in court without first presenting a timely claim is  
14 likely to have the suit dismissed.<sup>85</sup>

15 In order to ameliorate harsh results, the Government Claims Act allows some  
16 claimants who miss a six-month claim deadline to submit an application to present  
17 the claim late.<sup>86</sup>

### 18 ***Identification of Public Entity***

19 In order to present a claim, the proper public entity must be identified. To  
20 facilitate identification, a local public entity must file an information statement

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80. Van Alstyne, *A Study Relating to Sovereign Immunity*, *supra* note 64, at 311.

81. See *Stockton*, 42 Cal. 4th at 738; *Baines Pickwick Ltd. v. City of Los Angeles*, 72 Cal. App. 4th 298, 303, 85 Cal. Rptr. 2d 74 (1999); Van Alstyne, *supra* note 64, at 317.

82. *Id.*

83. Gov't Code § 911.2(a)-(b) (specifying that six-month claims include cause of action for death, or for injury to person, personal property, or growing crops, while one-year claims include any other causes of action). A single incident may give rise to both six-month and one-year claims. For example, a tort could damage both real property and personal property. In such cases, the claimant must follow the shorter deadline in order to include all claims. See, e.g., *Baillargeon v. Dep't. of Water & Power*, 69 Cal. App. 3d 670, 682, 138 Cal. Rptr. 338 (1977). The accrual date of a cause of action for purposes of a claim is determined in the same manner as the accrual date for the cause of action underlying the claim. Gov't Code § 901.

84. See, e.g., Code Civ. Proc. §§ 340(c) (allowing one year to file cause of action for libel or slander); 335.1, 339 (allowing two years for personal injury and oral contracts); 338(b), (c), (d) (allowing three years for fraud or injury to real or personal property); 337, 337.2, 343 (allowing four years for written contracts, collection of debt on account, collection of rents, and any other cause of action not currently listed).

85. *State v. Super. Ct.*, 32 Cal. 4th 1234, 1239, 90 P.3d 116, 13 Cal. Rptr. 3d 534 (2004) (holding that failure to present timely claim bars lawsuit).

86. Gov't Code §§ 911.4, 911.6; *Recommendation Relating to Sovereign Immunity, Number 2— Claims, Actions and Judgments Against Public Entities and Public Employees*, 4 Cal. L. Revision Comm'n Reports 1003, 1009 (1963).

1 with the Secretary of State.<sup>87</sup> In addition, a public entity must identify itself as  
2 such on letterhead and identification cards.<sup>88</sup> A public entity that does not properly  
3 identify itself cannot use a claimant's misidentification as a reason to dismiss a  
4 claim.<sup>89</sup>

5 While these requirements remove one source of technical dismissal, not all  
6 entities are required to file and appear on the Roster of Public Agencies. A public  
7 entity may be a subsidiary of another entity. A subsidiary is not independently  
8 responsible for its torts and is not required to file an identifying statement with the  
9 Secretary of State.<sup>90</sup> A claim or action must be filed against the parent entity. The  
10 failure to identify the correct entity is usually fatal to a claim.<sup>91</sup>

11 A school district is an independent entity and individual schools are subsidiaries  
12 of the school district.<sup>92</sup>

### 13 ***Content of Claims***

14 A proper claim includes basic information about the claimant and the claim.<sup>93</sup> It  
15 must also include enough detail to support the legal theory on which a subsequent  
16 complaint is grounded.<sup>94</sup>

17 The Government Claims Act recognizes that claimants may make mistakes in  
18 the filing of claims and offers some provisions to minimize technical dismissals.<sup>95</sup>

### 19 **Public Entity Liability**

20 The Government Claims Act provides that a public entity is not liable for an  
21 injury, except as provided by statute.<sup>96</sup> In other words, all public entity liability is  
22 statutory.

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87. Gov't Code § 53051 (requiring public entity to file statement with Secretary of State that includes entity's name and address, as well as name and address of members of its governing body, and requiring Secretary of State and each county clerk to maintain Roster of Public Agencies).

88. Gov't Code § 7530.

89. Gov't Code § 946.4.

90. *Hovd v. Hayward Unified Sch. Dist.*, 74 Cal. App. 3d 470, 472, 141 Cal. Rptr. 527 (1977).

91. See *id.*

92. See, e.g., *id.*

93. Gov't Code § 910 (requiring information about the claimant, circumstances that gave rise to the claim, nature of the indebtedness, obligation, injury, damage, or loss, and amount of claim).

94. See, e.g., *Stockett v. Ass'n of Cal. Water Agencies Joint Powers Ins. Auth.*, 34 Cal. 4th 441, 447, 99 P.3d 500, 20 Cal. Rptr. 3d 176 (2004) (requiring facts in claim to correspond to facts in subsequent complaint with enough detail to support one or more theories of recovery).

95. See Gov't Code §§ 910.6(a) (allowing claimant to amend claim before presentation period expires), 910.6(b) (allowing court to excuse technical defects if claim substantially complied with statutory requirements); see also Gov't Code §§ 910.8 & 911 (requiring entity to inform claimant of defects and substantial deviation from claim presentation procedures).

96. Gov't Code § 815(a).



1 However, the Act itself establishes four significant statutory bases for liability:

- 2 • A public entity is vicariously liable for an injury caused by an act or  
3 omission of an employee within the scope of employment (unless the  
4 employee is immune from liability).<sup>97</sup>
- 5 • A public entity is liable for an injury caused by an act or omission of an  
6 independent contractor, to the same extent that a private person would be.<sup>98</sup>
- 7 • A public entity may be liable for an injury that results from the breach of a  
8 mandatory duty imposed by an enactment that is designed to protect against  
9 the type of injury that occurred.<sup>99</sup>
- 10 • A public entity may be liable for an injury caused by a “dangerous  
11 condition” of its property.<sup>100</sup>

12 In addition, a constitutional provision or statute outside of the Government  
13 Claims Act can establish public entity liability.<sup>101</sup>

14 A public entity’s liability is limited by any immunity conferred by statute and is  
15 subject to any defense that would be available to a private person.<sup>102</sup> Immunities  
16 that are most relevant to the operation of a school are discussed below.

## 17 **Relevant Immunities**

### 18 ***Discretionary Act***

19 A public employee is generally “not liable for an injury resulting from his act or  
20 omission where the act or omission was the result of the exercise of the discretion  
21 vested in him, whether or not such discretion be abused.”<sup>103</sup> This immunity also  
22 shields the public employer against vicarious liability for the employee’s act or  
23 omission.<sup>104</sup>

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97. Gov’t Code § 815.2.

98. Gov’t Code § 815.4.

99. Gov’t Code § 815.6. See also Gov’t Code § 810.6 (“enactment” defined).

100. Gov’t Code §§ 830, 835.

101. See California Government Tort Liability Practice §§ 9.60-9.81, at 561-95 (Cal. Cont. Ed. Bar, 4th ed. 2011).

102. Gov’t Code § 815(b). Note, however, that the Government Claims Act immunities do not limit liability that is based on contract and do not limit the right to obtain relief other than money or damages. Gov’t Code § 814.

103. Gov’t Code § 820.2.

104. Gov’t Code § 815.2(b).

1 Discretionary act immunity allows public employees to exercise policy  
2 judgment without fear of liability. This gives public entities broad authority to  
3 determine public policy without undue interference.<sup>105</sup>

4 Although the Government Claims Act recognizes discretionary immunity, it  
5 does not provide any guidelines to distinguish discretionary acts from other acts.  
6 As a result, a significant body of case law has developed to address the issue.<sup>106</sup>

7 The basic definition of a discretionary decision is one that requires a policy  
8 judgment and is made within the scope of employment. A policy judgment is  
9 deliberate and considered with a conscious weighing of the risks and benefits.  
10 Without these elements, a decision is considered ministerial and not immune.<sup>107</sup>

11 The courts have also used a variety of other criteria to determine whether a  
12 decision is discretionary. For example, a court may review the statutes governing  
13 the entity or employee to see whether they indicate discretion. A court may also  
14 determine whether a decision affects the public at large. If so, then the decision is  
15 often discretionary. Otherwise, the decision is likely to be considered  
16 ministerial.<sup>108</sup>

### 17 ***Misrepresentation***

18 As a general rule, a public employee is not liable for an injury resulting from a  
19 misrepresentation made within the scope of employment, regardless of whether  
20 the misrepresentation is negligent or intentional.<sup>109</sup> However, this immunity does  
21 not apply if the employee “is guilty of actual fraud, corruption or actual malice.”<sup>110</sup>

### 22 ***Punitive or Exemplary Damages***

23 A public entity is not liable for punitive or exemplary damages.<sup>111</sup> Nor is a  
24 public entity authorized to indemnify an employee for any “part of a claim or  
25 judgment that is for punitive or exemplary damages.”<sup>112</sup>

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105. *Number 1 — Tort Liability of Public Entities and Public Employees*, *supra* note 65, at 812 (noting that, without discretionary immunity, actions of public entity or employee could be scrutinized by court—effectively allowing court to determine policy).

106. California Government Tort Liability Practice, *supra* note 101, at §§ 10.8-10.12, at 616-22.

107. *Johnson v. State*, 69 Cal. 2d 782, 788, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

108. *Caldwell v. Montoya*, 10 Cal. 4th 972, 982, 897 P.2d 1320, 42 Cal. Rptr. 2d 842 (1995) (granting immunity to school board for its decision to fire superintendent despite allegations of discrimination, because board was given statutory discretion to hire and fire superintendent); but see *Sullivan v. County of Los Angeles*, 12 Cal. 3d 710, 527 P.2d 865, 117 Cal. Rptr. 241 (1974) (holding that jailer who refused to release prisoner after all charges had been dismissed was not immune); see generally California Government Tort Liability Practice, *supra* note 101, §§ 10.8-10.29, at 616-52.

109. Gov’t Code § 818.8.

110. *Id.*

111. Gov’t Code § 818.

112. Gov’t Code § 825(a).

1 Punitive damages are intended to punish a defendant for oppression, fraud, or  
2 malice. “They are inappropriate where a public entity is involved, since they  
3 would fall upon the innocent taxpayers.”<sup>113</sup>

4 Furthermore, the imposition of a large exemplary damage award against a public  
5 school “would place severe and disproportionate financial constraints on [the  
6 school’s] ability to provide the free education mandated by the Constitution...”<sup>114</sup>

### 7 ***Execution of Law***

8 A public employee is not liable for an act or omission, exercised with due care,  
9 in the execution or enforcement of any law.<sup>115</sup> Nor is a public employee liable for  
10 an injury that results from the initiation of, or failure to initiate, a judicial or  
11 administrative proceeding within the scope of employment, even if the employee  
12 acts with malice or without probable cause.<sup>116</sup>

13 These immunities preserve government’s discretion on how to best serve the  
14 public:

15 Public officials must be free to determine these questions without fear of  
16 liability either for themselves or for the public entities that employ them if they  
17 are to be politically responsible for these decisions.

18 The remedy for officials who make bad law, who do not adequately enforce  
19 existing law, or who do not provide the people with services they desire, is to  
20 replace them with other officials. But their discretionary decisions in these areas  
21 cannot be subject to review in tort suits for damages if government is to govern  
22 effectively.<sup>117</sup>

### 23 ***Act Under Apparent Authority of Invalid Law***

24 A public employee is not liable for a good faith act under the apparent authority  
25 of an enactment that is unconstitutional, invalid, or inapplicable (except to the  
26 extent that the employee would be liable if the enactment were valid).<sup>118</sup>

### 27 **Defense and Indemnification**

28 The potential for personal liability might inhibit public employees’ willingness  
29 to fully perform their jobs. To alleviate those concerns, the defense and  
30 indemnification provisions of the Government Claims Act were adopted.<sup>119</sup> These

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113. *Number 1 – Tort Liability of Public Entities and Public Employees*, *supra* note 65, at 817.

114. *Wells v. One2One Learning Found.*, 39 Cal. 4th 1164, 1198-99, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006).

115. Gov’t Code § 820.4. This provision does not exonerate an employee from liability for false arrest or false imprisonment.

116. Gov’t Code § 821.6.

117. *Number 1 – Tort Liability of Public Entities and Public Employees*, *supra* note 65, at 817.

118. Gov’t Code § 820.6.

119. Gov’t Code §§ 825-825.6.

1 provisions encourage public employees to execute their employment duties with  
2 zeal and without fear that they would be personally required to pay for the costs of  
3 a judgment or defense.<sup>120</sup> These statutory rights to defense and indemnification are  
4 in addition to any rights that may exist under another enactment or contract.<sup>121</sup>

5 The defense and indemnification provisions of the Government Claims Act are  
6 substantively similar to the equivalent provisions governing the private sector. An  
7 employer in the private sector also has an obligation to indemnify its employees  
8 for conduct within the scope of employment. Indemnification includes reasonable  
9 costs for a defense.<sup>122</sup>

## 10 STATUS OF CHARTER SCHOOL 11 UNDER EXISTING LAW

12 Under existing law, charter schools are treated as public entities for some  
13 purposes, but not for other purposes.

14 By statute, charter schools are deemed to be part of the public school system for  
15 constitutional purposes, operating under the jurisdiction of the public schools and  
16 under the exclusive control of public officials.<sup>123</sup> A court of appeal has affirmed  
17 that status.<sup>124</sup>

18 In addition, charter schools are treated as public for purposes of participation in  
19 the State Teachers' Retirement Fund and participation in a joint powers  
20 agreement.<sup>125</sup>

21 Charter schools also share many of the operational characteristics of public  
22 schools:

- 23 • They are funded with public money.
- 24 • They are nonsectarian.
- 25 • They cannot charge tuition.
- 26 • They are bound by the same nondiscrimination rules as traditional public
- 27 schools.
- 28 • They must offer a minimum duration of days and minutes of instruction.

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120. See Gov't Code §§ 825.4, 825.6; *Johnson v. State*, 69 Cal. 2d 782, 791-92, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); *Number 1 – Tort Liability of Public Entities and Public Employees*, *supra* note 65, at 814; *Recommendation Relating to Sovereign Immunity, Number 4 – Defense of Public Employees*, 4 Cal. L. Revision Comm'n Reports 1301, 1307 (1963).

121. Gov't Code § 996.6.

122. Lab. Code §§ 2802, 2804; see, e.g., *Jacobus v. Krambo Corp.*, 78 Cal. App. 4th 1096, 1100, 93 Cal. Rptr. 2d 425 (2000).

123. Educ. Code § 47615.

124. *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125-37, 89 Cal. Rptr. 2d 745 (1999).

125. Gov't Code §§ 6528, 20610.

- 1 • They must provide for special education students in the same manner as
- 2 traditional public schools.
- 3 • They are entitled to a fair allocation of public school facilities.
- 4 • They are required to conduct standardized testing in the same manner as
- 5 traditional public schools.
- 6 • Their teachers must be certificated.
- 7 • Their employees are eligible to participate in state retirement programs.

8 Taken together, these facts could support a view that charter schools are  
9 fundamentally similar to traditional public schools and were intended by the  
10 Legislature to be public entities on equal footing with every other school in the  
11 public school system.

12 However, on the specific issue of sovereign immunity, the California courts  
13 have held that charter schools are not public entities:

- 14 • In *Wells v. One2One Learning Foundation*, the Court held that charter  
15 schools are not public entities for the purposes of the False Claims Act and  
16 the Unfair Competition Law and are therefore subject to suit under those  
17 statutes.<sup>126</sup>
- 18 • In *Knapp v. Palisades Charter High School*, the court held that a charter  
19 school that is formed as a nonprofit corporation is not a public entity for the  
20 purposes of the Government Claims Act.<sup>127</sup>

21 There is some disagreement about whether charter schools are public entities for  
22 purposes of the Ralph M. Brown Open Meeting Act, the California Public Records  
23 Act, and the Political Reform Act of 1974.

24 All of these issues are discussed more fully below.

### 25 ***Wilson v. State Board of Education***

26 *Wilson v. State Board of Educ.* was the first case to address the public entity  
27 status of charter schools.<sup>128</sup> In *Wilson*, a group of taxpayers challenged the  
28 constitutionality of charter schools. The trial court denied their petition for a writ  
29 of mandate requiring the San Francisco Board of Education to refrain from  
30 granting charters or expending public funds on charter schools.

31 The court of appeal upheld the trial court's decision, holding that (1) charter  
32 schools are public schools for the purposes of the state constitution, (2) charter  
33 schools are under the jurisdiction of the public school system, and (3) charter

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126. *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006).

127. *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708, 53 Cal. Rptr. 3d 182 (2007).

128. *Wilson v. State Board of Educ.*, 75 Cal. App. 4th 1125, 89 Cal. Rptr. 2d 745 (1999).

1 school officials are officers of public schools as long as they administer charter  
2 schools according to the law and their charters.<sup>129</sup>

3 The court of appeal began its analysis by quoting a report of the “Little Hoover  
4 Commission,” which seems to suggest that charter schools are public entities at  
5 base, despite having some characteristics of private entities:

6 Charter schools are grounded in private-sector concepts such as competition-  
7 driven improvement . . . , employee empowerment and customer focus. But they  
8 remain very much a public-sector creature, with in-bred requirements of  
9 accountability and broad-based equity. Simple in theory, complex in practice,  
10 charter schools promise academic results in return for freedom from  
11 bureaucracy.<sup>130</sup>

12 In its analysis, the court noted that the Legislature has plenary power over the  
13 public schools.<sup>131</sup> Consequently, the Legislature has broad discretion in the details  
14 of implementing the public school system, so long as it meets the requirements of  
15 Article IX of the California Constitution.

16 The decision to create charter schools as part of the public school system was a  
17 “valid exercise of legislative discretion aimed at furthering the purposes of  
18 education.”<sup>132</sup> The court explained:

19 Indeed, it bears underscoring that charter schools are strictly creatures of  
20 statute. From how charter schools come into being, to who attends and who can  
21 teach, to how they are governed and structured, to funding, accountability and  
22 evaluation — the Legislature has plotted all aspects of their existence. Having  
23 created the charter school approach, the Legislature can refine it and expand,  
24 reduce or abolish charter schools altogether.<sup>133</sup>

25 The charter school opponents argued that charter schools violate Section 8 of  
26 Article IX of the California Constitution, which provides in part that, “No public  
27 money shall ever be appropriated for the support of ... any school not under the  
28 exclusive control of the officers of the public schools....” The court rejected that  
29 argument, noting the express statutory language declaring that charter schools are  
30 part of the public school system.<sup>134</sup> Beyond that, the court found that charter  
31 schools are in fact under the exclusive control and jurisdiction of the public school  
32 system:

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129. See *id.* at 1137, 1139, 1141, 1142.

130. *Wilson*, 75 Cal. App. 4th at 1129 (quoting Com. on Cal. State Gov’t Organization and Economy, rep., *The Charter Movement: Education Reform School by School* (Mar. 1996), p. 1 (Little Hoover Report)).

131. *Id.* at 1134.

132. *Id.* at 1135.

133. *Id.*

134. *Id.* at 1139.

1 [We] wonder what level of control could be more complete than where, as here,  
2 the very destiny of charter schools lies solely in the hands of public agencies and  
3 offices, from the local to the state level: school districts, county boards of  
4 education, the Superintendent and the Board. The chartering authority controls the  
5 application approval process, with sole power to issue charters. ... Approval is not  
6 automatic, but can be denied on several grounds, including presentation of an  
7 unsound educational program. ... Chartering authorities have continuing over-  
8 sight and monitoring powers, with (1) the ability to demand response to inquiries  
9 concerning financial and other matters ... (2) unlimited access to “inspect or  
10 observe any part of the charter school at any time” ...; and (3) the right to charge  
11 for actual costs of supervisory oversight .... As well, chartering authorities can  
12 revoke a charter for, among other reasons, a material violation of the charter or  
13 violation of any law. ... Short of revocation, they can demand that steps be taken  
14 to cure problems as they occur. ... The Board, upon recommendation from the  
15 Superintendent, can also revoke any charter or take other action in the face of  
16 certain grave breaches of financial, fiduciary or educational responsibilities. ...  
17 Additionally, the Board exercises continuous control over charter schools through  
18 its authority to promulgate implementing regulations. ... Finally, public funding  
19 of charter schools rests in the hands of the Superintendent.<sup>135</sup>

20 This is true even if the charter school is formed as a nonprofit public benefit  
21 corporation, because the Corporations Code specifically provides for shared  
22 governance of a public benefit corporation:

23 We note too that situating the locus of control with the public school system  
24 rather than the nonprofit is not incompatible with the laws governing nonprofit  
25 public benefit corporations. Specifically, one of their enumerated powers is to  
26 “[p]articipate with others in any partnership, joint venture or other association,  
27 transaction or arrangement of any kind *whether or not such participation involves*  
28 *sharing or delegation of control with or to others.*”<sup>136</sup>

29 Furthermore, “charter school officials are officers of public schools to the same  
30 extent as members of other boards of education of public school districts. So long  
31 as they administer charter schools according to the law and their charters, as they  
32 are presumed to do, they stand on the same constitutional footing as noncharter  
33 school board members.”<sup>137</sup>

34 The court of appeal completes its opinion by noting that more detailed standards  
35 and guidelines for charter schools would defeat the purpose of encouraging  
36 innovation and experimentation.<sup>138</sup>

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135. *Id.* at 1139-40 (citations omitted).

136. *Id.* at 1140 (emphasis in original).

137. *Id.* at 1141.

138. *Id.* at 1147.

1 ***Wells v. One2One Learning Foundation***

2 In *Wells*, a group of students and their parents sued a group of charter schools.  
3 All but one of the charter school defendants were organized as nonprofit public  
4 benefit corporations. All of the charter school defendants, including the  
5 unincorporated school, were operated by a California nonprofit public benefit  
6 corporation.<sup>139</sup>

7 The basis of the complaint was that the schools failed to provide promised  
8 instructional services, equipment, and supplies. The schools only collected average  
9 daily attendance forms, which were then used to collect public money for services  
10 and supplies that were never provided. Among other allegations, the complaint  
11 included a False Claims Act cause of action for qui tam relief on behalf of the  
12 state.

13 The trial court held that the charter school defendants were public entities  
14 subject to the claim presentation requirements of the Government Claims Act and  
15 dismissed the claims for failure to comply with those requirements.<sup>140</sup> The  
16 plaintiffs appealed. The court of appeal concurred that charter schools are public  
17 entities. The court of appeal also held that public entities can be sued under the  
18 False Claims Act.

19 The California Supreme Court reversed on several grounds.

20 ***Application of False Claims Act***

21 The Court held that public entities may not be sued under the False Claims Act.  
22 However, the Court also held that the charter school defendants were not public  
23 entities under the False Claims Act. Thus, the school district could not be sued  
24 under the False Claims Act, but the charter school defendants could be sued under  
25 the False Claims Act.<sup>141</sup>

26 In its analysis, the Court first focused on the text of the False Claims Act, which  
27 has a statutory definition of a “person” who may be sued under the act. That  
28 definition makes no mention of public entities. Consequently, on its face, it is  
29 unclear that the False Claims Act should apply to a public entity. The definition  
30 expressly includes “corporations,” suggesting that the act was intended to apply to  
31 charter schools operated as corporations.

32 The Court also applied a traditional rule of construction to the effect that a  
33 general statute applies to a public entity unless such application would infringe  
34 upon sovereign governmental powers.<sup>142</sup>

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139. *Wells v. One2One Learning Found.*, 39 Cal. 4th 1164, 1200-01, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006).

140. *Id.* at 1183.

141. *Id.* at 1196-97, 1201.

142. *Id.* at 1192.



1 In evaluating whether application of the False Claims Act to a school district  
2 would infringe upon sovereign governmental powers, the Court focused on the  
3 fiscal effect of the statute and the sharply limited fiscal resources of school  
4 districts.<sup>143</sup> The False Claims Act imposes treble damages and penalties on a  
5 person who is found to have submitted a false claim. The Court held that the  
6 Legislature did not intend for such “draconian” fiscal penalties to apply to cash-  
7 strapped school districts. To do so “would place severe and disproportionate  
8 financial constraints on their ability to provide the free education mandated by the  
9 Constitution — a result the Legislature cannot have intended.”<sup>144</sup>

10 The Court then distinguished the charter school defendants from public school  
11 districts, concluding that the application of the False Claims Act to a charter  
12 school operated by a nonprofit public benefit corporation would not unduly  
13 infringe on sovereign governmental power. The Court described the charter  
14 schools as “distinct outside entities,” and compared them to “nongovernmental  
15 entities that contract with state and local governments to provide services on their  
16 behalf.”<sup>145</sup> Discussing the interference in the provision of public education that  
17 would result from imposing treble damages on school districts, the Court stated  
18 that the Charter Schools Act “assigns no similar sovereign significance to charter  
19 schools or their operators.”<sup>146</sup>

20 The Court reasoned that the depletion of the fiscal resources of a charter school  
21 would not necessarily interfere with the State’s operation of the public school  
22 system. Even if a charter school were to close because of False Claims Act  
23 penalties, the charter school’s students and remaining resources would simply  
24 return to the school district. Consequently, applying the California False Claims  
25 Act remedies to charter schools would not fundamentally threaten the provision of  
26 “adequate free public educational services.”<sup>147</sup>

### 27 ***Government Claims Act***

28 The Court also considered whether a False Claims Act cause of action against  
29 the charter school defendants required prior presentation of a claim under the  
30 Government Claims Act.

31 In its analysis, the Court acknowledged that charter schools are part of the public  
32 school system and are deemed to be school districts for specific purposes.  
33 However, the Court found that those purposes do not explicitly include the  
34 Government Claims Act, and that “for reasons previously discussed in connection  
35 with the [False Claims Act],” charter schools “do not fit comfortably within any of

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143. *Id.* at 1193-97.

144. *Id.* at 1198-99.

145. *Id.* at 1201.

146. *Id.*

147. *Id.* at 1202.

1 the categories defined, for purposes of the [Government Claims Act], as ‘local  
2 public entities.’”<sup>148</sup>

3 Those statements suggest that the Court’s False Claims Act analysis would  
4 apply equally to the question of whether the Government Claims Act should apply  
5 to charter schools. In other words, it suggests that the Court views such charter  
6 schools to be distinct outside entities, comparable to private contractors, and not  
7 invested with any sovereign significance that would justify application of the  
8 Government Claims Act.

9 However, the Court’s statements on this point may have been *dicta* (i.e.,  
10 statements unnecessary to its decision and thus of limited precedential value),  
11 because the Court had another reason for concluding that the claims were not  
12 subject to the Government Claims Act. The Court decided that False Claims Act  
13 claims are not subject to the Government Claims Act. The Court also noted that  
14 the False Claims Act imposes special sealed filing requirements that would be  
15 defeated by presentation of a claim against a defendant.<sup>149</sup>

16 Because that was a sufficient basis to decide the issue, the Court did not need to  
17 decide whether the Government Claims Act applies to charter schools.

### 18 ***Unfair Competition Law***

19 The Court also held that charter schools are “persons” subject to suit under the  
20 Unfair Competition Law. It reached that conclusion even though public entities  
21 have been held to be exempt from suit under the Unfair Competition Law.

22 In its analysis, the Court reiterated that charter schools are not considered public  
23 entities for the purposes of the False Claims Act. In addition, the Court observed  
24 that charter schools compete with traditional public schools and should therefore  
25 be subject to the Unfair Competition Law, which provides remedies for unfair  
26 competitive practices. Lastly, the Court concluded that application of the Unfair  
27 Competition Law to charter schools would not infringe the state’s sovereign  
28 obligations to operate public schools:

29 Nor is the state’s sovereign educational function thereby undermined. Even if  
30 governmental entities, in the exercise of their sovereign functions, are exempt  
31 from the [Unfair Competition Law’s] restrictions on their competitive practices,  
32 ... no reason appears to apply that principle to the charter school defendants,  
33 which are covered by the plain terms of the statute and which compete with the  
34 traditional public schools for students and funding.<sup>150</sup>

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148. *Id.* at 1214.

149. *Id.* at 1215.

150. *Id.* at 1204.

1 ***Knapp v. Palisades Charter High School***

2 Shortly after *Wells* was decided, a court of appeal was directly faced with the  
3 question of whether charter schools are subject to the claim presentation  
4 procedures of the Government Claims Act.<sup>151</sup> The court held that an incorporated  
5 charter school, operating independently from the chartering entity, is not a public  
6 entity for purposes of the Government Claims Act.<sup>152</sup>

7 The case arose after the plaintiff, Courtney Knapp (“Knapp”), then an eighth  
8 grade student, visited defendant Palisades Charter High School (“Palisades”) as a  
9 prospective student. According to the undisputed facts, Knapp was the target of  
10 sexual banter by a teacher during a classroom visit. Knapp was humiliated and  
11 embarrassed, and as a result of her experience, ultimately chose a different high  
12 school.<sup>153</sup>

13 Knapp sued Palisades, the Los Angeles Unified School District, and the teacher.  
14 The trial court granted the defendants’ motion for summary judgment, because  
15 Knapp did not present a claim to those defendants before filing the lawsuit.<sup>154</sup>

16 Taking direction from *Wells*, the court of appeal held that “assuming [Palisades]  
17 can demonstrate that it is a nonprofit corporation independent from the [chartering  
18 entity], we follow *Wells* and conclude that Knapp was not required to present  
19 written claims to the charter school under the [Government Claims Act] before  
20 filing her sexual harassment and tort claims.”<sup>155</sup>

21 **“Good Government” Laws**

22 Traditional public school districts are subject to certain “good government” laws  
23 that require open public board meetings (the Brown Act<sup>156</sup>), public access to  
24 district records (the California Public Records Act<sup>157</sup>), and restrictions on conflicts  
25 of interest in decision making (the Political Reform Act of 1974<sup>158</sup>).

26 There are good reasons to believe that these statutes also apply to charter  
27 schools, as “quasi-public entities” (i.e., as private entities formed pursuant to  
28 statute in order to perform delegated public functions). However, there is no  
29 consensus on this point.

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151. See *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708, 53 Cal. Rptr. 3d 182 (2007).

152. *Id.* at 717.

153. *Id.* at 711-12.

154. *Id.* at 713.

155. *Id.* at 717.

156. Gov’t Code § 54950 *et seq.*

157. Gov’t Code § 6250 *et seq.*

158. Gov’t Code § 81000 *et seq.*

1     ***Political Reform Act of 1974***

2     The Fair Political Practices Commission (“FPPC”) is authorized to issue written  
3     opinions and advice interpreting the Political Reform Act of 1974.<sup>159</sup>

4     Shortly after the Act took effect, the FPPC issued an opinion on whether the Act  
5     applies to a “quasi-public entity.”<sup>160</sup> The FPPC announced four criteria for  
6     determining whether a quasi-public entity is governed by the Political Reform Act:

- 7         (1) Whether the impetus for formation of the corporation originated with a  
8             government agency;
- 9         (2) Whether it is substantially funded by, or its primary source of funds is, a  
10            government agency;
- 11        (3) Whether one of the principal purposes for which it is formed is to provide  
12            services or undertake obligations which public agencies are legally  
13            authorized to perform and which, in fact, they traditionally have performed;  
14            and
- 15        (4) Whether the [c]orporation is treated as a public entity by other statutory  
16            provisions.<sup>161</sup>

17     Those criteria were later applied in FPPC advice letters discussing the specific  
18     issue of whether a charter school created as a nonprofit public benefit corporation  
19     is subject to the Political Reform Act. In each case, the FPPC concluded that a  
20     charter school formed as a nonprofit public benefit corporation meets all of the  
21     stated criteria and is therefore subject to the Political Reform Act.<sup>162</sup>

22     ***The Ralph M. Brown Open Meeting Act***

23     The Brown Act requires that the meetings of a “legislative body” of a “local  
24     public entity” be open to the public. A school district is a “local public entity”  
25     under the Brown Act.<sup>163</sup>

26     The term “legislative body” generally means the governing body of a local  
27     public entity, but it can also encompass the board of a private entity, if that entity:

28         Is created by the elected legislative body in order to exercise authority that may  
29         lawfully be delegated by the elected governing body to a private corporation,  
30         limited liability company, or other entity.<sup>164</sup>

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159. Gov’t Code § 83114.

160. See *In re Siegel*, 3 FPPC Ops 62 (1977).

161. *Id.*

162. See *Walsh* Advice Letter, No. A-98-234 (1998); *Fadely* Advice Letter, No. A-02-223 (2002).

163. Gov’t Code § 54951.

164. Gov’t Code § 54952(c)(1)(A). See, e.g., *Epstein v. Hollywood Entertainment Dist. II Bus. Improvement Dist.*, 87 Cal. App. 4th 862, 104 Cal. Rptr. 2d 857 (2000) (Brown Act applies to private property owners association to which city delegated certain public functions).

1 The Brown Act’s standard for application of the Act to a quasi-public entity  
2 would seem to encompass a charter school that is approved by a local school  
3 district. Such a charter school is created by an elected legislative body (the local  
4 school board) to exercise lawfully delegated authority of the school board (the  
5 operation of a public school). Although there is no published appellate decision on  
6 whether the Brown Act applies to a charter school that is formed as a nonprofit  
7 public benefit corporation, at least one trial court has held the Act to be applicable  
8 to such a charter school.<sup>165</sup>

### 9 ***California Public Records Act***

10 The California Public Records Act requires that the records of a public entity be  
11 subject to public inspection and copying. That general requirement is subject to a  
12 lengthy list of specific exceptions, many of which are designed to preserve the  
13 privacy of personal information in public records.<sup>166</sup>

14 The application of the Public Records Act to local quasi-public entities is  
15 coextensive with the application of the Brown Act (it expressly incorporates the  
16 Brown Act’s definition of “legislative body.”)<sup>167</sup>

17 Consequently, if the Brown Act applies to a charter school organized as a  
18 nonprofit public benefit corporation, the California Public Records Act also  
19 applies.

### 20 ***No Consensus on Application of Good Government Laws to Charter Schools***

21 There is no consensus about whether these good government laws apply to a  
22 charter school.

23 In 2010, legislation was introduced to make clear that charter schools are subject  
24 to these good government laws.<sup>168</sup> The bill was approved by the Legislature but  
25 was vetoed by the Governor. In his veto message Governor Schwarzenegger  
26 characterized the bill as imposing “new” requirements on charter schools,  
27 suggesting he did not believe the good government laws already applied to charter  
28 schools.<sup>169</sup>

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165. See Garretson, *Charter Board in Violation of Meeting Act, Judge Sends Directors Back to School*, Marin Ind. J., July 10, 2001, at 1J.

166. See generally Gov’t Code §§ 6250-6276.48.

167. Gov’t Code § 6252(a).

168. AB 572 (Brownley) (2010).

169. *Id.* (veto message).

## TREATMENT OF CHARTER SCHOOLS IN OTHER JURISDICTIONS

As part of the background for this report, the Commission examined the laws of 39 other U.S. jurisdictions that authorize charter schools.

Twenty-three of those jurisdictions have express statutory provisions that apply their governmental liability laws to charter schools, either in whole or in part.<sup>170</sup> In addition, a federal court has held that Colorado's governmental liability law applies to its charter schools.<sup>171</sup> Finally, in four other jurisdictions, the statutes appear to treat charter schools as public entities for all purposes, presumably including the application of governmental liability law.<sup>172</sup> Consequently, 28 of the 39 charter school jurisdictions appear to apply state governmental immunity laws to their charter schools.<sup>173</sup>

170. Arkansas (Ark. Code Ann. § 21-9-301); Delaware (Del. Code Ann. tit. 14, § 504(d)); District of Columbia (D.C. Code § 38-1802.04(17)); Florida (Fla. Stat. § 1002.33(12)(h) (tort liability of governing body and employees limited pursuant to Fla. Stat. Ann. § 768.28)); Idaho (Idaho Code Ann. § 33-5204(2)); Illinois (105 Ill. Comp. Stat. 5/27A-5(g)(3)); Massachusetts (Mass. Gen. Laws ch. 71, § 89(y)); Michigan (Mich. Comp. Laws §§ 380.503(7), 380.523(4), 380.553(7), 380.1311e(7)); Minnesota (Minn. Stat. § 124.D.10 subd. 8(k)); Missouri (Mo. Rev. Stat. § 160.405(11)); New Hampshire (N.H. Rev. Stat. Ann. § 194-B:3); New York (N.Y. Educ. Code § 2853(g)); North Carolina (N.C. Gen. Stat. § 115C-238.29F(c)(1)); Ohio (Ohio Rev. Code Ann. § 2744.01(F)); Oklahoma (Okla. Stat. tit. 70, § 3-136: 13); Oregon (Or. Rev. Stat. § 338.115(i)); Pennsylvania (24 Pa. Cons. Stat. § 17-1714-A); Rhode Island (R.I. Gen. Laws § 16-77-4.1); South Carolina (S.C. Code Ann. § 59-40-50(B)(4)); Tennessee (Tenn. Code Ann. § 49-13-125); Texas (Tex. Educ. Code Ann. § 12.1056); Utah (Utah Code Ann. § 53A-1a-514); Virginia (Va. Code Ann. § 22.1-212.16).

171. *King v. United States*, 53 F. Supp. 2d 1056, 1067 (D. Colo. 1999), *rev'd in part*, 301 F.3d 1270 (10th Cir. 2002).

172. Hawaii (Haw. Rev. Stat. § 302B-9(d) ("Notwithstanding any law to the contrary, as public schools and entities of the State, neither a charter school nor the office may bring suit against any other entity or agency of the State."); see also Hawaii Office of Information Practices, Op. Ltr. 05-09 (charter schools are "agencies" subject to sunshine laws)); Nevada (Nev. Rev. Stat. Ann. § 386.549 ("The governing body of a charter school is a public body.")); New Jersey (N.J. Stat. Ann. § 18A:36A-11(a) ("A charter school shall operate in accordance with its charter and the provisions of law and regulation which govern other public schools...")); Wyoming (Wyo. Stat. Ann. § 21-3-304(e) ("A charter school, as a public school, is a governmental entity.")).

173. In the remaining 11 jurisdictions, the status of charter schools under governmental liability laws has not been clearly addressed. Alaska (Alaska Stat. § 14.03.255(a)); Arizona (Ariz. Rev. Stat. § 15-181; 2000 Ariz. AG LEXIS 5); Connecticut (Conn. Gen. Stat. § 10-66ff); Georgia (Ga. Code Ann. §§ 20-2-2062(3), 20-2-2065); Iowa (Iowa Code §§ 256F.1-256F.10); Indiana (Ind. Code § 20-24-8-4 (not subject to statutes that govern school boards and school districts)); Kansas (Kan. Stat. Ann. § 72-1903); Louisiana (La. Rev. Stat. Ann. § 17:3996; 2010 U.S. Dist. LEXIS 6019 ("The fact that the charter school performs a governmental function does not make it a political subdivision of the state. The Supreme Court has stated that "a private entity perform[ing] a function which serves the public does not make its acts state action."); 2004 La. AG LEXIS 424, 7-8 (La. AG 2004) ("A type 2 charter school is an independent public school that is operated pursuant to a charter between a nonprofit corporation and the Board of Elementary and Secondary Education. La. R.S. 17:3973. A charter school is not a political subdivision of the state and is therefore not subject to the mandates set forth in Title 43, Chapter 4 of the Louisiana Revised Statutes."));

1 However, it should be noted that only one of those 28 jurisdictions appears to  
2 broadly exempt charter schools from the health and safety laws that govern public  
3 schools.<sup>174</sup> Twenty-three of the 28 jurisdictions expressly provide by statute that  
4 charter schools are subject to school health and safety laws, in whole or in part.<sup>175</sup>  
5 The four remaining jurisdictions that apply governmental immunity law to charter  
6 schools permit regulatory requirements to be waived on the approval of specified  
7 public authorities.<sup>176</sup> The Commission does not know whether, as a practical  
8 matter, such waivers are granted for health and safety requirements.

9 In sum, most jurisdictions that extend governmental immunities to charter  
10 schools also require compliance with school health and safety laws. That fact is  
11 significant. The Commission believes that a combination of governmental  
12 immunity and exemption from school health and safety laws could, in some  
13 situations, lead to heightened health and safety risks.<sup>177</sup>

## 14 LEGAL AND POLICY ANALYSIS

15 The Commission has been charged with analyzing the legal and policy  
16 implications of treating a charter school as a public entity for the purposes of the  
17 Government Claims Act.

### 18 Legal Implications

19 The direct legal effects of such a change in the law are obvious. A charter school  
20 would then be subject to the special rules regulating and limiting claims against  
21 public entities. Most significantly:

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Maryland (Md. Code Ann., Educ. § 9-102); New Mexico (N.M. Stat. Ann. § 22-8B-4(P)); Wisconsin (Wis. Stat. § 118.40(7)(am) (district to determine whether charter school is “instrumentality” of the school district)).

174. Idaho Code Ann. § 33-5210(4).

175. Arkansas (Ark. Code Ann. § 6-23-103); Delaware (Del. Code Ann. tit. 14, § 512(12)); District of Columbia (D.C. Code § 38-1802.04(c)(4)(B)); Florida (Fla. Stat. § 1002.33(16)(a)(5)); Hawaii (Haw. Rev. Stat. § 302B-9(a)(3)); Illinois (105 Ill. Comp. Stat. 5/27A-5(d)); Louisiana (La. Rev. Stat. Ann. § 17:3996(A)); Massachusetts (Mass. Gen. Laws ch. 71, § 89(bb)); Michigan (Mich. Comp. Laws § 380.503(6)); Minnesota (Minn. Stat. § 124.D.10 subd. 8(a)); Missouri (Mo. Rev. Stat. § 160.405(5)(2)); Nevada (Nev. Rev. Stat. Ann. § 386.527(8) (facilities)); New Hampshire (N.H. Rev. Stat. Ann. § 194-B:8(II)); New Jersey (N.J. Stat. § 18A:36A-11(a)); New York (N.Y. Educ. Code § 2854(1)(b)); Ohio (Ohio Rev. Code Ann. § 3314.072(B) (school building safety standards)); Oklahoma (Okla. Stat. tit. 70, § 3-136(a)(1)); Oregon (Or. Rev. Stat. § 338.115(j)); Pennsylvania (Pa. Cons. Stat. § 17-1722-A (regulation of facilities); see also Pa. Cons. Stat. § 17-1732-A (specified health and safety laws applicable)); South Carolina (S.C. Code Ann. § 59-40-50(B)(1)); Tennessee (Tenn. Code Ann. §§ 49-13-105(b)(2), 49-13-11(c)(1)); Texas (Tex. Educ. Code § 12.104(b)(2)(K)); Utah (Utah Code Ann. § 53A-1a-507(3)).

176. Colorado (Colo. Rev. Stat. § 22-30.5-104(b)); Rhode Island (R.I. Gen. Laws § 16-77.3-6); Virginia (Va. Code Ann. § 22.1-212.6(B)); Wyoming (Wyo. Stat. Ann. § 21-3-304(g)).

177. See discussion below.

- 1 • In most cases, a person wishing to sue a charter school for money or  
2 damages would be required to present a claim, prior to filing the lawsuit.<sup>178</sup>
- 3 • A charter school would be immune from punitive damages.<sup>179</sup>
- 4 • A charter school would be immune from liability for common law torts.<sup>180</sup>
- 5 • A charter school would be immune from liability for an employee's  
6 discretionary act.<sup>181</sup>
- 7 • A charter school would be immune from liability for an employee's  
8 misrepresentation.<sup>182</sup>
- 9 • A charter school would be immune for an employee's act or omission,  
10 exercised with due care, in the execution or enforcement of law.<sup>183</sup>
- 11 • A charter school would be immune for an employee's initiation of, or failure  
12 to initiate, a judicial or administrative proceeding within the scope of  
13 employment.<sup>184</sup>
- 14 • A charter school would be immune for an employee's good faith act under  
15 the apparent authority of an enactment that is unconstitutional, invalid or  
16 inapplicable.<sup>185</sup>
- 17 • A charter school would be subject to special rules on liability for a  
18 dangerous condition of property.<sup>186</sup>

19 Beyond those direct legal effects, a statute declaring a charter school to be a  
20 public entity for purposes of the Government Claims Act would also have two  
21 indirect effects worth noting:

- 22 • It would resolve any existing uncertainty as to whether the Government  
23 Claims Act applies to charter schools.
- 24 • It would introduce new uncertainty as to the status of a charter school under  
25 other statutes governing public entities.

26 Those indirect effects are discussed more fully below.

### 27 ***Uncertainty as to Application of Government Claims Act***

28 As discussed above, in *Wells* the California Supreme Court did not squarely  
29 decide whether a charter school is a public entity for purposes of the Government

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178. Gov't Code §§ 900-950.8.

179. Gov't Code §§ 818, 825.

180. Gov't Code § 815.

181. Gov't Code § 820.2.

182. Gov't Code § 818.8.

183. Gov't Code § 820.4. This provision does not exonerate an employee from liability for false arrest or false imprisonment.

184. Gov't Code § 821.6.

185. Gov't Code § 820.6.

186. Gov't Code § 835.



1 Claims Act. It was not necessary for the Court to decide that issue, because it held  
2 that the Government Claims Act does not apply to the type of claim at issue in the  
3 case (a False Claims Act *qui tam* action). Consequently, there is no controlling  
4 Supreme Court precedent on the status of a charter school under the Government  
5 Claims Act.

6 In *Knapp*, the court of appeal did squarely hold that an incorporated charter  
7 school is not a public entity for the purposes of the Government Claims Act.  
8 However, it did not make a decision on whether the same would be true of a  
9 charter school that is organized as a dependent part of a school district, rather than  
10 as an independent legal entity.

11 Furthermore, while the *Knapp* precedent is binding on all inferior California  
12 courts, the Supreme Court and other courts of appeal are not bound and could  
13 reach a contrary result.<sup>187</sup>

14 In addition, a recent unpublished federal trial court decision contradicted *Knapp*,  
15 holding that a charter school is a public entity for the purposes of California's  
16 Government Claims Act.<sup>188</sup> It is unclear why the federal court did not defer to  
17 California appellate authority in construing a California statute.<sup>189</sup> Nonetheless, the  
18 federal decision arguably creates a division of authority on the issue, whatever its  
19 precedential or persuasive weight.

20 Consequently, it is not certain that *Knapp* is the last word on the status of  
21 incorporated charters under the Government Claims Act. Moreover, there is no  
22 precedential guidance on the status of a charter school that is formed as a  
23 dependent component of a school district, rather than as a separately incorporated  
24 entity.

25 This uncertainty could be legally problematic. A person with a claim against a  
26 charter school needs to know whether to submit a claim under the claims  
27 presentation procedure of the Government Claims Act. Failure to submit a  
28 necessary claim could bar the person from filing suit.

29 It would therefore be helpful to eliminate any uncertainty as to whether the  
30 Government Claims Act applies to a charter school.

### 31 ***New Uncertainty Regarding Validity of Wells Holdings***

32 If a statute were enacted to make the Government Claims Act applicable to  
33 charter schools, it could cast doubt on the continuing validity of the Supreme  
34 Court's holdings in *Wells*.

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187. See *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455, 369 P.2d 937, 20 Cal. Rptr. 321 (Cal. 1962).

188. See *Dubose v. Excelsior Educ. Ctr.*, No. EDCV 10-0214 GAF (C.D. Cal. Sept. 22, 2010). See also Commission Staff Memorandum 2011-7 (Jan. 31, 2011).

189. See *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1099 (9th Cir. 2003) (federal court bound to follow California court of appeal's interpretation of California law "absent convincing evidence that the California Supreme Court would reject the interpretation").

1 As discussed above, the *Wells* decision was grounded in the Court’s conclusion  
2 that a charter school is a nongovernmental entity that does not have sovereign  
3 significance. The Court found no policy reason to immunize a charter school from  
4 liability under the False Claims Act (including potential treble damages) or the  
5 Unfair Competition Law.

6 If the Legislature were to enact a statute declaring that a charter school is  
7 entitled to the sovereign immunities conferred by the Government Claims Act,  
8 including immunity from punitive damages, that could create uncertainty about  
9 whether the Court’s reasoning and holdings in *Wells* remain valid.

10 That problem could perhaps be avoided through the enactment of an express  
11 statement of legislative intent, making clear that a statute governing the  
12 application of the Government Claims Act to charter schools is not intended to  
13 affect the application of any other statute to charter schools. However, parties  
14 could still argue that the policies embodied in a legislative reform relating to the  
15 Government Claims Act should be considered in evaluating the application of  
16 other statutes (including the statutes addressed in *Wells*).

### 17 **Policy Implications**

18 Before analyzing the specific policy implications of treating a charter school as a  
19 public entity for the purposes of the Government Claims Act, it would be helpful  
20 to revisit the general policy principles underlying tort liability and sovereign  
21 immunity.

22 Tort liability provides a civil remedy for injuries caused by others. Under the  
23 fault theory of tort liability, the party who breaches a duty of care and causes an  
24 injury must compensate the injured party. This serves three purposes:

- 25 (1) It shifts losses away from an innocent injured party and to the responsible  
26 party.
- 27 (2) It deters behavior likely to cause injury.
- 28 (3) It encourages the use of precautions to prevent injury.<sup>190</sup>

29 Applying the fault theory of tort liability to government entities can be  
30 problematic. Government engages in many activities that serve the public at large.  
31 These activities are mandated by law and reflect policy decisions made by the  
32 people through their legislators. A public entity may not have the luxury of halting  
33 a service simply because it is deemed too costly or risky.<sup>191</sup>

34 Although sovereign immunity was originally grounded in the idea that  
35 government entities are sovereign and cannot be sued without permission, more  
36 modern rationales have developed to justify the application of sovereign

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190. Van Alstyne, *supra* note 64, at 271-72.

191. See *Number 1 – Tort Liability of Public Entities and Public Employees*, *supra* note 65, at 810.

1 immunity. Two closely related arguments constitute the primary modern  
2 justifications for governmental immunity: protection of the public fisc and the  
3 need to allow government to govern.

4 Protecting the public fisc is important for several reasons. The costs of  
5 defending actions for injuries caused by government activity could be very  
6 expensive. To cover such costs, resources may be diverted from important  
7 government activities or tax rates may increase. Further, when a public entity is  
8 involved, shifting losses away from an innocent injured party places the burden on  
9 another arguably innocent party — the taxpayer.<sup>192</sup>

10 The potential of having to allocate a large portion of the public fisc to money  
11 damages may significantly impair the government's ability to govern. Resources  
12 are limited and the government should be allowed to decide how to best allocate  
13 those resources. A public entity cannot effectively carry out its duties if too many  
14 of its resources are devoted to defending lawsuits and paying claims, or if the  
15 entity constrains important activities in order to avoid potential claims.<sup>193</sup>

16 The policy implications of extending sovereign immunity to charter schools are  
17 set out below.

### 18 ***Compensation***

19 One of the main policy justifications for tort liability is that it provides for  
20 compensation of an innocent injured person, by the person whose breach of duty  
21 caused the injury. This allocation of the cost of an injury is grounded in basic  
22 fairness.

23 Sovereign immunity can operate to preclude the compensation of an innocent  
24 person who has been injured by a public entity. All other considerations aside, that  
25 is an unfair result. It allows an entity that breached a duty to escape the  
26 consequences of the breach, and leaves the innocent injured person bearing the full  
27 cost of the injury.

28 Other policy considerations may justify limiting recovery in some  
29 circumstances. Nonetheless, the first policy implication of applying the  
30 Government Claims Act to a charter school would be:

31 **#1 Some innocent persons injured by charter schools would not be**  
32 **compensated for their injuries.**

### 33 ***Health and Safety Risk***

34 As noted earlier, public officials are immunized against liability for injuries that  
35 result from an employee's discretionary policy decisions. This could undermine  
36 deterrence, leading school officials to adopt policies that result in higher levels of

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192. See, e.g., *Alden v. Maine*, 527 U.S. 706, 750-51 (1999).

193. *Id.* at 750.

1 risk to student health and safety than the policies they would adopt in the absence  
2 of immunity.

3 However, the Legislature has constrained public school discretion on health and  
4 safety matters, by enacting a number of non-discretionary health and safety  
5 requirements. These regulations provide a check on a public school's ability to  
6 adopt risky policies, by ensuring that all public schools provide the specified  
7 minimum level of health and safety protection.

8 Charter schools are exempt from a number of health and safety laws that were  
9 enacted to protect school children. For example, charter schools are not subject to  
10 the Field Act earthquake safety standards.<sup>194</sup> Nor are charter schools required to  
11 prepare the comprehensive school safety plans and disaster procedures that are  
12 required of all other public schools.<sup>195</sup> Charter schools are also exempt from the  
13 law mandating the expulsion of students for specified dangerous offenses,  
14 including weapons possession, drug sales, and sexual assault.<sup>196</sup>

15 These exemption remove an important constraint on the discretion of charter  
16 schools in making health and safety policy decisions. Charter schools are not  
17 required to meet all of the same standards that apply to other public schools. In  
18 combination with immunity from liability for injuries that result from  
19 discretionary policy decisions, this could lead to higher levels of health and safety  
20 risk in charter schools than would be allowed in traditional public schools.<sup>197</sup>

21 Thus, the second policy implication of applying the Government Claims Act to a  
22 charter school would be:

23 **#2 The combination of discretionary immunity and exemption from public**  
24 **school health and safety laws could lead to riskier health and safety**  
25 **policies in charter schools than in traditional public schools.**

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194. See Educ. Code §§ 17280-17317, 17365-17374, 81050-81149.

195. See Educ. Code §§ 32280-32289. In their charters, charter schools are required to describe the procedures they will use to ensure pupil and staff health and safety. Educ. Code § 47605(b)(5)(F). However, there are no standards governing this requirement, and procedures can vary widely between charter schools.

196. See Educ. Code § 48915(c)-(d). The examples provided in this report are not intended to be exhaustive.

197. It should be noted that charter schools are schools of choice. Parents are never required to enroll their children in charter schools and are free to withdraw them and enroll them in other schools. This could create an additional check on student health and safety risks in charter schools that does not exist in a traditional public school. To the extent that parents become aware of risks to student health and safety in a charter school, they may choose to withdraw their children from the school.

While charter schools are not subject to the same statutory health and safety requirements that govern traditional public schools, they are required to develop their own health and safety policies as part of their charters. Failure to abide by those voluntarily adopted policies can lead to revocation of the charter and closure of the school. This does not guarantee the same level of protection that is afforded through statutory regulation. Nor does it provide for a uniform level of protection across the state's charter school population. But it could serve as a check against some risky health and safety practices.

1     ***Public Accountability***

2     In addition to potential tort liability, another important check on the exercise of  
3     policy discretion by a public entity is the body of laws requiring that public entity  
4     policy-making be transparent and open to public participation.

5     If the school board of a traditional public school district is considering a policy  
6     decision that might lead to higher health and safety risks to students, the decision  
7     would be made in an open meeting and the relevant records would be open to  
8     public inspection. Parents and other interested persons could then raise objections  
9     to the policy and, if warranted, bring political pressure to bear through their  
10    elected representatives.

11    As discussed earlier, there is disagreement about whether charter schools are  
12    subject to the Brown Act and the California Public Records Act. If not, then these  
13    “good government” laws would not be available as a check on charter school  
14    policy-making discretion. In that case, immunity from liability for injuries that  
15    result from discretionary policy-making decisions could lead charter school policy  
16    makers to tolerate higher levels of risk than they would if their decision making  
17    process were open to public scrutiny and involvement.

18    Thus, the third policy issue implicated by applying the Government Claims Act  
19    to a charter school would be:

20       **#3    The coupling of discretionary immunity with the possible exemption**  
21       **from good government laws could lead to the adoption of riskier health**  
22       **and safety policies in charter schools than in traditional public schools.**

23    ***Pedagogical Innovation***

24    The principal purpose of charter schools is to foster pedagogical innovation and  
25    improvement in the public school system.<sup>198</sup> By exempting charter schools from  
26    most of the requirements of the Education Code and granting them a significant  
27    degree of operational independence from school districts, the Charter Schools Act  
28    frees charter schools to experiment.

29    Concerns about potential tort liability could constrain pedagogical innovation in  
30    charter schools. If the potential tort liability is determined to be too great, charter  
31    school policy makers might be deterred from undertaking some innovations. If,  
32    however, charter schools were granted immunity under the Government Claims  
33    Act from liability for discretionary policy decisions, the scope for pedagogical  
34    innovation would probably be broadened.

35    This illustrates one of the modern justifications for sovereign immunity that is  
36    discussed above: allowing government to govern. Tort immunity frees a public  
37    entity to make a policy decision that it might avoid if it needed to factor in the cost  
38    of potential tort liability.

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198. See Educ. Code § 47601.

1 Thus, the fourth policy issue implicated by applying the Government Claims Act  
2 to a charter school would be:

3 **#4 Discretionary immunity could facilitate pedagogical innovation, by**  
4 **removing liability as a deterrent to experimentation.**

5 *Protecting the Public Fisc*

6 One of the modern justifications for sovereign immunity is to protect the public  
7 fisc, so that litigation costs and judgments do not overwhelm scarce public  
8 resources, undermining government's ability to perform its sovereign functions.  
9 With respect to public school districts, the Supreme Court recognized this concern  
10 in *Wells*:

11 As we will explain, in light of the stringent revenue, appropriations, and budget  
12 restraints under which all California governmental entities operate, exposing them  
13 to the draconian liabilities of the [False Claims Act] would significantly impede  
14 their fiscal ability to carry out their core public missions. In the particular case of  
15 public school districts, such exposure would interfere with the state's plenary  
16 power and duty, exercised at the local level by the individual districts, to provide  
17 the free public education mandated by the Constitution.

18 ...

19 Hence, there can be no doubt that public education is among the state's most  
20 basic sovereign powers. Laws that divert limited educational funds from this core  
21 function are an obvious interference with the effective exercise of that power.  
22 Were the [False Claims Act] applied to public school districts, it would constitute  
23 such a law. If found liable under the [False Claims Act], school districts, like  
24 other [False Claims Act] defendants, could face judgments — payable from their  
25 limited funds — of at least two, and usually three, times the damage caused by  
26 each false submission, plus civil penalties of up to \$10,000 for each false claim,  
27 plus costs of suit. Such exposure, disproportionate to the harm caused to the  
28 treasury, could jeopardize a district financially for years to come. It would injure  
29 the districts' blameless students far more than it would benefit the public fisc, or  
30 even the hard-pressed taxpayers who finance public education.<sup>199</sup>

31 The *Wells* Court concluded that the same concerns did not apply to an  
32 independently organized charter school:

33 If a charter school ceases to exist, its pupils are reabsorbed into the district's  
34 mainstream public schools, and the ADA revenues previously allotted to the  
35 charter school for those pupils revert to the district.

36 The [Charter Schools Act] was adopted to widen the range of educational  
37 choices available within the public school system. That is a salutary policy. Yet  
38 application of the [False Claims Act's] monetary remedies, however harsh, to the  
39 charter school defendants presents no fundamental threat to maintenance, within  
40 the affected districts, of basically adequate free public educational services. Thus,

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199. *Wells v. One2One Learning Found.*, 39 Cal. 4th 1164, 1193-95, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006).

1 application of the [False Claims Act] to the charter school operators in this case  
2 cannot be said to infringe the exercise of the sovereign power over public  
3 education.<sup>200</sup>

4 In effect, the Supreme Court seems to be saying that charter schools are  
5 fungible. If one fails, its students are reabsorbed by the district and the general  
6 program of public education continues without significant interference. This view  
7 has some merit, but the Court may be assigning too little significance to the  
8 disruption of public education that could result if an individual charter school is  
9 abruptly closed due to litigation.

10 The establishment of a charter school involves a significant investment of time,  
11 money, and effort. The operation of the charter school involves further investment  
12 and effort. Those investments are made with the expectation that educational  
13 benefits will result — improved learning opportunities for students and potentially  
14 useful experimentation in pedagogical practices. If a charter school is forced to  
15 close, that investment and the anticipated benefits would be lost. Furthermore,  
16 there would be transition costs as students and teachers are integrated back into  
17 other schools in the district. In addition to those costs, the transfer of students  
18 would be disruptive for the affected students and for the schools that receive them.

19 While these costs and disruptions would be temporary and would not fatally  
20 impair school district operations, they could have a significantly deleterious effect  
21 on public education programs.

22 Furthermore, if the potential financial instability of charter schools were  
23 significant enough, it might deter the creation of new charter schools. That could  
24 undermine the legislative policy embodied in the Charter Schools Act.

25 For the most part, charter schools can avoid these fiscal threats through liability  
26 insurance. However, there are some sources of liability that may be difficult or  
27 impossible to insure against. For example, general liability insurance does not  
28 cover punitive damages, because they are considered punishment for intentional  
29 wrongful acts. Consequently, a charter school could face a large punitive damage  
30 award against which it would not be insured.<sup>201</sup> Under the Government Claims  
31 Act, public entities are immune from punitive damages.<sup>202</sup>

32 In addition, charter schools, like traditional public schools, cannot charge  
33 tuition.<sup>203</sup> This places a limit on the fiscal resources available to charter schools.  
34 Unlike private schools, they cannot simply raise tuition rates in order to self-insure

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200. *Id.* at 1201.

201. This would probably be a rare occurrence. Punitive damages are only available for egregious intentional misconduct (“oppression, fraud, or malice”) that must be proven by clear and convincing evidence. See Civ. Code § 3294.

202. Gov’t Code § 818.

203. Educ. Code § 47605(d).

1 or pay litigation costs. This makes them more vulnerable than private schools to  
2 having their finances depleted as a result of tort liability.

3 Thus, another policy implication of treating charter schools as public entities  
4 under the Government Claims Act would be:

5 **#5 Application of the Government Claims Act to a charter school would**  
6 **help to preserve a charter school's scarce fiscal resources from**  
7 **depletion, and thereby prevent the negative consequences associated**  
8 **with closing a charter school, which could occur in the event of a**  
9 **judgment that is not covered by readily available liability insurance.**

10 *Uniquely Public Obligations*

11 Because a charter school is part of the public school system, it is subject to many  
12 of the fundamental rules governing the operation of public schools. For example:

- 13 • Charter schools must be nonsectarian.
- 14 • Charter schools cannot charge tuition.
- 15 • Charter schools are bound by the same nondiscrimination rules as traditional  
16 public schools.
- 17 • Charter schools must provide for special education students in the same  
18 manner as traditional public schools.

19 These uniquely public obligations could give rise to types of liabilities that could  
20 only be faced by a school within the public school system (either a charter school  
21 or a traditional public school). For example, Education Code Section 48907  
22 protects student free speech rights in all public schools, including charter schools.  
23 A charter school faces potential liability under that provision that a purely private  
24 school would not face.<sup>204</sup>

25 This puts charter schools in a uniquely disadvantageous position. A charter  
26 school has many of the same obligations (and potential liabilities) as a traditional  
27 public school, without the protections against liability that are afforded to a  
28 traditional public school under the Government Claims Act.

29 If an alleged breach of a public obligation involves intentional misconduct, it  
30 may be difficult for a charter school to obtain affordable insurance to protect  
31 against liability.

32 This problem would be minimized if a charter school were treated as a public  
33 entity for purposes of the Government Claims Act. Any liability that a charter  
34 school faces as a consequence of its public obligations would be subject to the

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204. A charter school could also face liability under the Unruh Act or the Bane Act for illegal discrimination or a violation of civil rights, arising from the charter school's obligations as part of the public school system. See Civ. Code §§ 51, 52.1. Standard commercial liability insurance may not cover all injuries arising from such wrongs. See, e.g., Civ. Code § 2773 (barring indemnity for future unlawful act); Ins. Code § 533 (barring coverage of wilful act).



1 same procedures and immunities that govern similar claims against traditional  
2 public schools.

3 Consequently, another policy implication of treating a charter school as a public  
4 entity under the Government Claims Act would be:

5 **#6 Application of the Government Claims Act to a charter school would**  
6 **eliminate an existing disparity, in which a charter school may face**  
7 **uniquely public liabilities as a consequence of being part of the public**  
8 **school system, without the same protections that are afforded to other**  
9 **public schools.**

### 10 *Summary*

11 To reiterate, the policy implications of treating a charter school as a public entity  
12 under the Government Claims Act appear to be as follows:

13 #1 Some innocent persons injured by charter schools would not be  
14 compensated for their injuries.

15 #2 The combination of discretionary immunity and exemption from public  
16 school health and safety laws could lead to riskier health and safety policies  
17 in charter schools than in traditional public schools.

18 #3 The coupling of discretionary immunity with the possible exemption from  
19 good government laws could lead to the adoption of riskier health and safety  
20 policies in charter schools than in traditional public schools.

21 #4 Discretionary immunity could facilitate pedagogical innovation, by  
22 removing liability as a deterrent to experimentation.

23 #5 Application of the Government Claims Act to a charter school would help to  
24 preserve a charter school's scarce fiscal resources from depletion, and  
25 thereby prevent the negative consequences associated with closing a charter  
26 school, which could occur in the event of a judgment that is not covered by  
27 readily available liability insurance.

28 #6 Application of the Government Claims Act to a charter school would  
29 eliminate an existing disparity, in which a charter school may face uniquely  
30 public liabilities as a consequence of being part of the public school system,  
31 without the same protections that are afforded to other public schools.

## 32 **ALTERNATIVE APPROACHES**

33 The preceding sections of this report discuss the legal and policy implications of  
34 treating a charter school as a public entity for the purposes of the Government  
35 Claims Act.

36 While it is helpful to identify those implications in isolation, it would be more  
37 helpful to place them in the context of possible legislative reforms on the topic.  
38 There are a range of alternative approaches that the Legislature might consider in  
39 determining how to address the status of charter schools under the Government

1 Claims Act. Each of those alternatives presents a different configuration of legal  
2 and policy advantages and disadvantages.

3 This section of the report identifies various alternative approaches to reform and  
4 summarizes the advantages and disadvantages of each.

5 The Commission makes no recommendation on which of the alternative  
6 approaches should be adopted. Each presents a different balancing of contending  
7 policy considerations. Those considerations involve fundamental questions about  
8 the value of charter schools within the public education system and the importance  
9 of any heightened level of risk to student health and safety that might result from  
10 extending sovereign immunity to charter schools. There are likely to be sharp  
11 differences in perspective on how best to balance those important concerns.  
12 Consequently, there is no clear answer as to which alternative approach would  
13 best serve the People of California. An issue of this fundamentally political  
14 character would be best decided by the People's elected representatives, not by the  
15 Commission.

#### 16 **“Dependent” Charter Schools: A Special Case?**

17 Before considering alternative approaches that might be applied to all charter  
18 schools, regardless of their form of organization, it is worth considering whether a  
19 distinction should be drawn between:

- 20 • An “independent” charter school formed as a nonprofit corporate entity,  
21 separate from its chartering authority.
- 22 • A “dependent” charter school that is not legally separate from its chartering  
23 authority.

24 As discussed above, the *Knapp* case expressly limited its holding — that a  
25 charter school is not a public entity for the purposes of the Government Claims  
26 Act — to an independent charter school that is organized as a nonprofit  
27 corporation. There are two good reasons for drawing such a distinction: (1) the  
28 limited liability of a chartering entity for the torts and obligations of an  
29 independent charter school, and (2) the separate legal identity and hence quasi-  
30 public, as opposed to purely public, character of an independent charter school.

#### 31 ***Liability of Chartering Entity***

32 A chartering entity is not liable for the debts, obligations, or torts of a charter  
33 school that is formed as a nonprofit public benefit corporation.<sup>205</sup> This means that  
34 the finances of the chartering school district will not be directly affected by any  
35 liability imposed on an incorporated charter school. Consequently, concerns about  
36 conserving the public fisc are not strongly implicated with respect to the liability

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205. See Educ. Code § 47604.

1 of an incorporated charter school. No matter what liability such a school incurs,  
2 none will directly reach the chartering school district.

3 By contrast, if a charter school is not incorporated, the chartering entity could  
4 potentially be held liable for the torts and obligations of the charter school. In that  
5 case, concern about protecting the public fisc would weigh in favor of granting a  
6 dependent charter school the same degree of sovereign immunity as the public  
7 school district of which it is part. A suit against either the dependent charter school  
8 or the district itself could have the same disruptive effect on the district's finances.

### 9 ***Legal Identity***

10 If a charter school is formed as an independent nonprofit corporation, it has a  
11 legal identity that is separate from the chartering entity. That separate identity  
12 seems to be the source of the question of whether a charter school is a public  
13 entity.

14 If a charter school is instead formed as an inseparable organizational subdivision  
15 of a public school district, it would seem uncontroversial to conclude that the  
16 school has the same legal identity and status as the district of which it is a part.

17 Such a distinction could be expressed as follows:

18 (a) A dependent charter school is deemed to be a public entity.

19 (b) For the purposes of this section, "dependent charter school" means a charter  
20 school that is formed as an organizational subdivision of the public entity that  
21 chartered it, rather than as a separate legal entity. "Dependent charter school"  
22 does not include a charter school that is formed as a nonprofit public benefit  
23 corporation.

24 If this approach were adopted, the question of whether to apply the Government  
25 Claims Act to an independent charter school would remain unanswered.  
26 Alternative approaches to answering that question are discussed below.

### 27 **Alternative #1. Public for All Purposes**

28 The first alternative would be to enact a statute declaring that a charter school is  
29 a public entity, without limitation. Thus:

30 A charter school is deemed to be a public entity.

31 This approach would make the Government Claims Act applicable to a charter  
32 school, but it would also subject charter schools to all other laws that regulate  
33 public entities as public entities (e.g., the Brown Act, the California Public  
34 Records Act, public contracting laws, and public employment laws).

35 The Commission is not authorized to evaluate the substantive merits of treating  
36 a charter school as a public entity for the purposes of laws other than the

1 Government Claims Act.<sup>206</sup> Because it lacks that authority, the Commission has  
2 not undertaken such an analysis. The alternative discussed here is offered only to  
3 provide the Legislature with a complete range of options for its consideration.

4 The discussion of advantages and disadvantages that follows is not intended as  
5 commentary on whether a charter school should be subject to any law other than  
6 the Government Claims Act. It is intended only as an evaluation of how the  
7 alternative discussed here would affect the legal and policy implications discussed  
8 earlier in the report.

### 9 *Advantages*

10 With respect to the legal and policy implications discussed above, the  
11 advantages of the alternative under discussion would be as follows:

- 12 • **Legal Clarity.** There would be no ambiguity as to whether a charter school  
13 is governed by the Government Claims Act. Nor would there be any  
14 ambiguity regarding the status of charter schools under other laws affecting  
15 public entity liability (e.g., the False Claims Act).
- 16 • **Good Government Laws as a Check on Policy Discretion.** The  
17 application of good government laws to charter schools would act as a check  
18 on policy-making discretion. This would reduce the likelihood that  
19 immunity for discretionary policy decisions would lead to a higher level of  
20 student health and safety risk.
- 21 • **No Chilling of Pedagogical Innovation.** Immunity from liability for  
22 discretionary decisions would make it easier for charter schools to adopt  
23 pedagogical innovations that might otherwise impose too great a risk of  
24 liability.
- 25 • **Protection of Limited Fiscal Resources.** The immunities conferred by the  
26 Government Claims Act would help to avoid the loss of investment, loss of  
27 pedagogical benefit, disruption, and transition costs that might result if a  
28 charter school were forced to close as a result of a large judgment against  
29 the school. This would only be an advantage with respect to types of  
30 liability for which liability insurance is not readily available (e.g., punitive  
31 damages or liability for intentional wrongs).

### 32 *Disadvantages*

33 With respect to the legal and policy implications discussed above, the  
34 disadvantages of the alternative under discussion would be as follows:

- 35 • **Compensation Undermined.** Some innocent persons injured by charter  
36 schools would not be compensated for their injuries.
- 37 • **Heightened Student Health and Safety Risks.** Declaring that a charter  
38 school is a public entity would not affect the exemption of charter schools  
39 from the student health and safety laws that regulate school districts. That

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206. The Commission's charge in this study is to evaluate the implications of applying the Government Claims Act to charter schools. See 2009 Cal. Stat. res. ch. 98.

1 exemption, combined with the discretionary policy immunity conferred by  
2 the Government Claims Act, could lead to an increased risk of harm to  
3 students in charter schools, as compared to students in traditional public  
4 schools.

## 5 **Alternative #2. Public for Government Claims Act Purposes Only**

6 A statute could be enacted to declare that a charter school is a public entity for  
7 purposes of the Government Claims Act, without addressing the status of a charter  
8 school under other laws that regulate public entities:

9 A charter school is a public entity for the purposes of Division 3.6  
10 (commencing with Section 810) of Title 1 of the Government Code.

### 11 ***Advantages***

12 With respect to the legal and policy implications discussed above, the  
13 advantages of the alternative under discussion would be as follows:

- 14 • **Legal Clarity.** There would be no ambiguity as to whether a charter school  
15 is governed by the Government Claims Act.
- 16 • **No Chilling of Pedagogical Innovation.** Immunity from liability for  
17 discretionary decisions would make it easier for charter schools to adopt  
18 pedagogical innovations that might otherwise impose too great a risk of  
19 liability.
- 20 • **Protection of Limited Fiscal Resources.** The immunities conferred by the  
21 Government Claims Act would help to avoid the loss of investment, loss of  
22 pedagogical benefit, disruption, and transition costs that might result if a  
23 charter school were forced to close as a result of a large judgment against  
24 the school. This would only be an advantage with respect to types of  
25 liability for which liability insurance is not readily available (e.g., punitive  
26 damages or liability for intentional wrongs).

### 27 ***Disadvantages***

28 With respect to the legal and policy implications discussed above, the  
29 disadvantages of the alternative under discussion would be as follows:

- 30 • **Compensation Undermined.** Some innocent persons injured by charter  
31 schools would not be compensated for their injuries.
- 32 • **Heightened Student Health and Safety Risks.** Declaring that a charter  
33 school is a public entity would not affect the exemption of charter schools  
34 from the student health and safety laws that regulate school districts. That  
35 exemption, combined with the discretionary policy immunity conferred by  
36 the Government Claims Act, could lead to an increased risk of student harm  
37 in charter schools, as compared to students in traditional public schools. The  
38 existing uncertainty about whether good government laws apply to charter  
39 schools could exacerbate the problem, by shielding health and safety policy-  
40 making from public scrutiny.
- 41 • **New Legal Uncertainty.** The application of the Government Claims Act to  
42 charter schools could lead to uncertainty about the continuing validity of the

1 holdings in *Wells* (i.e., that charter schools lack “sovereign significance”  
2 sufficient to justify exempting them from suit under the False Claims Act  
3 and Unfair Competition Law).

### 4 **Alternative #3. Combined Approach**

5 Legislation could be enacted to declare that a charter school is a public entity for  
6 purposes of the Government Claims Act, in combination with one or both of the  
7 following reforms:

- 8 • Make some or all student health and safety laws applicable to charter  
9 schools.
- 10 • Make the good government laws applicable to charter schools (perhaps with  
11 minor operational adjustments to account for the special character of charter  
12 schools).

13 This would arguably provide a more balanced approach, with charter schools  
14 enjoying privileges of public entity status, while being held to the general  
15 standards of public accountability that apply to public entities.

16 The Commission is not authorized to evaluate the substantive merits of treating  
17 a charter school as a public entity for the purposes of good government or health  
18 and safety laws.<sup>207</sup> Because it lacks that authority, the Commission has not  
19 undertaken such an analysis. The alternative discussed here is offered only to  
20 provide the Legislature with a complete range of options for its consideration.

21 The discussion of advantages and disadvantages that follows is not intended as  
22 commentary on whether a charter school should be subject to any law other than  
23 the Government Claims Act. It is intended only as an evaluation of how the  
24 alternative discussed here would affect the legal and policy implications discussed  
25 earlier in the report.

#### 26 ***Advantages***

27 With respect to the legal and policy implications discussed above, the  
28 advantages of the alternative under discussion would be as follows:

- 29 • **Legal Clarity.** There would be no ambiguity as to whether a charter school  
30 is governed by the Government Claims Act.
- 31 • **No Chilling of Pedagogical Innovation.** Immunity from liability for  
32 discretionary decisions would make it easier for charter schools to adopt  
33 pedagogical innovations that might otherwise impose too great a risk of  
34 liability.
- 35 • **Protection of Limited Fiscal Resources.** The immunities conferred by the  
36 Government Claims Act would help to avoid the loss of investment, loss of  
37 pedagogical benefit, disruption, and transition costs that might result if a

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207. The Commission’s charge in this study is to evaluate the implications of applying the Government Claims Act to charter schools. See 2009 Cal. Stat. res. ch. 98.

1 charter school were forced to close as a result of a large judgment against  
2 the school. This would only be an advantage with respect to types of  
3 liability for which liability insurance is not readily available (e.g., punitive  
4 damages or liability for intentional wrongs).

- 5 • **Health and Safety Risks Minimized.** The application of general student  
6 health and safety laws would reduce the likelihood that immunity for  
7 discretionary policy decisions would lead to a higher level of student health  
8 and safety risk. The application of good government laws to charter schools  
9 would have a similar effect.

#### 10 ***Disadvantages***

11 With respect to the legal and policy implications discussed above, the  
12 disadvantages of the alternative under discussion would be as follows:

- 13 • **Compensation Undermined.** Some innocent persons injured by charter  
14 schools would not be compensated for their injuries.
- 15 • **New Legal Uncertainty.** The application of the Government Claims Act to  
16 charter schools could lead to uncertainty about the continuing validity of the  
17 holdings in *Wells* (i.e., that charter schools lack “sovereign significance”  
18 sufficient to justify exempting them from suit under the False Claims Act  
19 and Unfair Competition Law).

#### 20 **Alternative #4. Limited Application of Government Claims Act**

21 A statute could be enacted to declare that a charter school is a public entity for  
22 the purposes of the Government Claims Act, but only with respect to a claim  
23 arising from a charter school’s uniquely public obligations. That is, the  
24 Government Claims Act would only apply to a claim against a charter school if the  
25 claim is a type of claim that can only be brought against a public entity.

26 Thus:

27 If a claim against a charter school is a type of claim that can only be brought  
28 against a public entity, the claim is subject to Division 3.6 (commencing with  
29 Section 810) of Title 1 of the Government Code. For the purposes of this section,  
30 a charter school is deemed to be a public entity.

31 This would provide for consistent treatment of such claims. The Government  
32 Claims Act would apply to a claim arising from a public obligation, regardless of  
33 whether the claim is brought against a charter school or against a traditional public  
34 school.

35 For example, under this approach, the Government Claims Act would apply to  
36 the following claims (which can only be brought against a charter school or other  
37 school in the public school system):

- 38 • A claim alleging that a charter school violated Education Code Section  
39 47605(d) (requiring that charter schools be nonsectarian).
- 40 • A claim alleging that a charter school violated Education Code Section  
41 48907 (protecting student expression in public schools).

- A claim alleging that a charter school violated Education Code Section 56145 (requiring that a charter school serve students with exceptional needs in the same manner as such students are served in other public schools).

Under the approach described above, the Government Claims Act would not apply to claims that could also be brought against a private school. For example:

- A general tort or contract claim.
- A claim brought pursuant to the California False Claims Act.<sup>208</sup>
- A claim alleging that a charter school violated the general whistleblower protections provided in Labor Code Section 1102.5.

### ***Advantages***

With respect to the legal and policy implications discussed above, the advantages of the alternative under discussion would be as follows:

- **Uniform Treatment of Public Claims.** Under existing law, charter schools are uniquely disadvantaged. They face liabilities that arise from their obligations as public schools, without the Government Claims Act protections that are available to other public schools. This approach would eliminate that disparity in treatment.
- **Reduced Chilling of Pedagogical Innovation.** Immunity from liability for some discretionary decisions (those relating to uniquely public obligations) would make it easier for charter schools to adopt pedagogical innovations that might otherwise impose too great a risk of liability.
- **Protection of Limited Fiscal Resources.** The immunities conferred by the Government Claims Act would help to avoid the loss of investment, loss of pedagogical benefit, disruption, and transition costs that might result if a charter school were forced to close as a result of a large judgment against the school. This would only be an advantage with respect to types of liability for which liability insurance is not readily available (e.g., punitive damages or liability for intentional wrongs).

### ***Disadvantages***

With respect to the legal and policy implications discussed above, the disadvantages of the alternative under discussion would be as follows:

- **Likely Increase in Litigation.** A rule that provides significantly different treatment for different types of claims is likely to lead to confusion and increased litigation, as parties misunderstand or dispute the proper classification of particular claims. These problems are likely to be pervasive, given that each individual claimant must determine, in a short period of time, whether his or her claim is subject to the claims presentation requirements of the Government Claims Act. Because an error on this point could lead to dismissal of a claim, it seems likely that the issue would be litigated frequently.

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208. Gov't Code § 12650 *et seq.*



- **Compensation Undermined.** Some innocent persons injured by charter schools would not be compensated for their injuries.

### **Alternative #5. Not Public for Government Claims Act Purposes**

A statute could be enacted to declare that a charter school is not a public entity for the purposes of the Government Claims Act:

A charter school is not a public entity for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.

#### ***Advantages***

With respect to the legal and policy implications discussed above, the advantages of the alternative under discussion would be as follows:

- **Compensation Preserved.** Sovereign immunity would not be available to preclude the compensation of innocent persons injured by charter schools.
- **Potential Liability Would Deter Risky Behavior.** One of the principal policy justifications for tort liability is that it deters unduly risky behavior and encourages appropriate precautions to be taken against harm. This is particularly important for charter schools, considering that they are exempt from some student health and safety laws and may not be subject to good government laws.
- **Legal Clarity.** There would be no ambiguity as to whether a charter school is governed by the Government Claims Act. In addition, because this approach would be compatible with the holdings in *Wells*, the continuing validity of those holdings would not be cast into doubt.

#### ***Disadvantages***

With respect to the legal and policy implications discussed above, the disadvantages of the alternative under discussion would be as follows:

- **Chilling of Pedagogical Innovation.** Charter schools could be deterred from adopting pedagogical innovations as a result of liability concerns.
- **Limited Fiscal Resources at Risk.** Unlimited exposure to tort liability (including possible punitive damages) could threaten the viability of charter schools, to the extent that liability insurance is not available for certain types of activities. If a charter school fails as a result of liability, the public school system would suffer a loss of investment, a loss of pedagogical benefit, disruption, and transition costs. This could significantly impair a school district's educational program.

## **CONCLUSION**

There are competing legal and policy considerations for each of the approaches presented in this report. None of the approaches is clearly superior to the others. They each present a different balancing of legitimate policy concerns. For that reason, the Commission makes no recommendation on which of the alternatives would strike the best policy balance.

1        However, the Commission does recommend that the Legislature address the  
2        issue in some way. As discussed above, the law on the issue is not entirely settled:

- 3        •        There is no clear court decision on the status of dependent charter schools  
4        with respect to the Government Claims Act.
- 5        •        The decision in *Knapp* is not binding on the California Supreme Court or  
6        other court of appeal districts. This leaves the door open for further appellate  
7        litigation on the issue.
- 8        •        One federal trial court has contravened the holding in *Knapp*.

9        A clear statutory expression of the status of charter schools under the Government  
10       Claims Act would eliminate these problematic sources of uncertainty.

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